INDIAN INSTITUTE OF PUBLIC ADMINISTRATION
NEW DELHI

NATIONAL SEMINAR
ON
DECISION-MAKING IN CRIMINAL JUSTICE SYSTEM
SEPTEMBER 29 - OCTOBER 1, 1980

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Seminar Coordinator
Prof.S.Venugopala Rao

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PROGRAMME

29.9.80 (MONDAY)	
0900-0930	Registration
0930-1030	Inauguration: Mr. Justice V.R. Krishna Iyer
1030-1100	Coffee break
1100-1300	Presentation of working paper
1300-1430	Lunch
1430-1700	Discussion
30.9.80 (TUESDAY)	
1000-1300	Discussion
1300-1430	Lunch
1430-1630	Discussion
1630-1700	Tea break
1700-	Valedictory Address: Mr. Justice O. Chinnappa Reddy
1.10.80(WEDNESDAY)	(For out-station Delegates)
1000-1300	Informal discussion
1300-1430	Lunch

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CONSENSUS AND CONFLICT IN CRIMINAL JUSTICE ADMINISTRATION: SOME PROBLEMS IN DECISION-MAKING

By

S.Venugopal Rao

1. INTRODUCTION

The simplest definition of crime is 'an act punishable by law'. The term covers the vast range of acts of varying degrees of seriousness and social impact which are deemed to be injurious to society regardless of the manner in which they are perceived and acted upon. It represents individual and collective deviance from formalized norms of society at a particular point of its evolution with accent on state intervention.

There are genuine difficulties in reconciling the abstract principles of justice with the practical aspects of administering it. A concrete view of the purpose of administration of criminal justice may be taken as maintenance of harmonious relations in society. In perspective, it amounts to regulation of the conduct of the members of society in accordance with a set of ground rules whose transgressions are sought to be prevented and controlled through decisions at different stages of the criminal justice process.

The criminal justice system is an ubiquitous

feature of all societies both primitive and evolved. It's rationale is rooted in implicit acceptance of the principle that socialised human beings behave in such manner that the attainment of social objectives is maximised and the non-harmonious or anti-social behaviour can be minimised through the exercise of coercive power of the state. Since the state's intervention is an integral feature of the system, it has to be ensured that coercion is neither arbitrary nor unbridled. The multifaceted social concern (both for maximum harmonious behaviour and minimum anti-social behaviour) is the prime determinant of the quality of criminal justice.

The three major components of the criminal justice system are the police, the judiciary and the correctional services. The role of the police has been spelt out as maintenance or order and prevention and detection of crime. The role of the judiciary is perceived as adjudication, and interpretation of law.

The role of the correctional institutions is security control of those who are entrusted to them in the final stages of the criminal justice process. The specific goals of the components are, however, directed towards the harmonious functioning of the society which constitutes the primary goal of the total system.

For long, the sub-systems functioned in isolation with understandable emphasis on their tasks and functions, which were often confused with organizational goals. There was little interaction among them except to the extent that their functions brought them into contact with each other at a particular stage of the criminal process. It is only recently that the need for greater harmony in the operations of the components is being felt and articulated. The decisions taken at different stages may be conflicting and contradictory; and the strategies may be divergent and even subject to critical scrutiny by other components; but they do form part of the total process. It is the inadequate appreciation of the ultimate objective of the total system which has contributed to many distortions in the overall performance of the system.

It can be argued that although the different components of the criminal justice system are expected to strive towards a common goal, their relationship is amorphous because they are structurally independent. They may share vaguely the broad objectives of crime control, but each component has its own priorities, values, standards of evaluation, methods and skills. In consequence, the system in its operation generates conflicts at ideological and operational levels. The ideological conflicts arise from the manner in which each of the components perceives itself and accepts the value gamut of the total

system. Operational conflicts emerge from the fact each component tries to maintain its unique position and identity in the system.

The object of the present paper is to identify the areas and sources of conflict in the existing system of administration of criminal justice and examine the need, desirability and strategies of conflict minimisation with a view to achieving a higher degree of harmony with the total system's primary goals.

II. INTER - COMPONENT CONFLICTS.

(i) Police and Judiciary:

Order maintenance and prevention and investigation of crime by the police are subject to constant scrutiny of the judiciary as they have to be performed within the confines of law. In societies where the degree of social homogeneity is pronounced, 'order' functions do not pose serious problems, but in a pluralistic society in which fragmented groups are in a state of constant struggle, police intervention is frequent. Politicization of inter-group conflicts tends to make the police partisan and results in over-reaction. Decisions at this stage are taken under pressures which are not visible to the judicial system and leads to a polarity of attitudes.

There is further intensification of conflict between the two systems in the investigation of crime governed rigidly by rules of procedure which are justiceable at every stage. A number of examples can be cited. The police oppose bail while the courts tend to take a liberal stance in this regard. The police attitude is determined by the fear that once an offender is released on bail, he may commit more offences or exert infuence - coercive or persusive - to undermine their efforts aimed at successful prosecution. The judicial attitude, on the other hand, assumes the innocence of the accused till he is proved guilty and underlines the need for protecting his interests. Similar points of conflict emerge in the matter of custody and interrogation of offenders, collection and recording of evidence, and other investigative processes. In the adversarial system of adjudication, the law enforcement agency which is really an integral part of the justice ensuring system is reduced to the position of an interested contestant in the 'dispute'. It is a situation in which inter-system conflict is inescapable due to the element of distrust a consequence of inadequate appreciation of roles. The fact that this mutual 'distrust' is institutionalized in legal procedure does not in any way reduce the potential for conflict. Thus, there is very little of the "shared objectives" between the two components. An example of

institutional stigmatization is in admissibility of statements made before police officers in the course of investigation which forces them to resort to subtle circumventions which create further points of conflict between them and the judges. We have thus an inherent conflict between two sub-systems as they function with mutual distrust though they subscribe to the same goal.

Conflict between the police and the judiciary depends largely on the nature of role perception and the model adopted for role performance. While the overall objective of the criminal justice system remains unquestioned, much depends upon each sub-system's perception of its role and of other complementary components and the emphasis it places on its operational strategies for the fulfilment of its perceived role. Herbert Packer makes a subtle distinction between the 'crime control' and 'due process models'. The value system of the police tends to be dominated by the crime control model by virtue of the pressure and compulsions on the system and is beased on a strong belief that repression of criminal conduct is by far the most important function of the criminal justice system. It's index of public acceptability is professional efficiency which is defined and determined by the success of their efforts reflected in convictions in courts. The courts, on the other hand, lay greater emphasis on 'due process' ie. scrupulous adherance

to the letter of law and perfection in adherence to legal procedure. This is in fact the reflection of the 'social concern' for the individual as against the concern articulated by the police for society in general. The police look towards the vindication of their role through court convictions, and when they are not forth-coming to the extent which reinforce their self-image, there is frustration eventually leading to deviation from proclaimed procedural norms and conflict with judicial components. Although the primary goals of the judiciary and the police are convergent, conflict emerges from the models they adopt in their functioning.

(ii) Police and Corrections:- The practioners in correctional administration complain that their efforts at reformation of criminals which constitute a major plank of crime prevention are frustrated by the punitive policies of the police which are repressive in nature. The criticism is not without some substance. For instance, when offenders are released on probation, the decision is taken in the belief that the offender will have an opportunity to lead a normal life without the stigma of punishment and that the probation machinery will help him to solve his inner crises. IN practice, however, this does not happen due to a variety of reasons among which are the inadequacy of the probation machinery itself, lack of receptivity of the offender, environmental pressures and societal apathy. Over-riding them is the

persistent surveillance of the police who have no faith in correctional ideology which they consider as 'soft justice'. Here is a clear-cut conflict situation involving the probation system and the police arising from their divergent ideological perceptions,

Conflicts arise also from hasty legislation which does not provide the resources for pursuing the correctional ideology. The enforcement of children's laws is a case in point. When laws are made without adequate preparation, the services function without institutional support which results either in gross violations of the spirit of laws or total lack of faith in them. This has been the experience over the last two decades in the fields of juvenile delinquency and can be identified as an important factor in the generation and sustenance of conflict between the two sub-system.

Any number of similar situational conflicts can be cited, but it is important to note that they emerge from divergent perceptions. When correctional administrators bemoan the lack of appropriate orientation among the police and the latter decry the latter's lack of cognition of the reality, they are looking at the same problem from different angles without attempting to establish a common level of understanding.

(iii) <u>The Judiciary and the Penal System</u>:- Once a judicial

decision is made, it is assumed that the decision is in consonance with the primary goal of the criminal justice system and has been made in full possess-ion of all information relevant to the decision. But in actual practice, it is not so. The judicial decision is often based on assumptions and anticip-tions of fulfilment of a well-thought out sentencing policy. Quite often, the sentence represents merely a pious wish unrelated to the realities of the situation. The penal system, with its inherent inadequacies and structural deficiencies, may not be performing the task implicit in the sentence to the extent and the level anticipated. In such circumstances the decision would be counter productive. Even in societies where support for correctional ideology is strong, the results do not appear to be satisfactory. In the American Context, a prisoner is reported to have expressed: "Few people inside the walls take seriously the notion of rehabilitation; for most, prison is to punish, restrain, scare. Most other efforts are distent ideals, nice to talk about and consider, but not to effect". The Chairman of the US Board of parole has said: "Research has so far shown that present treatment programmes are singularly unsuccessful in bringing about the rehabilitation of any one". The above assessment projucts the gap between sentencing decisions and their implementation and turns the focus on a major area of conflict between the judiciary and the correctional services. When the goals of one sub-

system are pitched high and the performance of another is grotesquely mis-matched, there is bound to be a strong sense of alienation between the components.

At times, the decisions taken in correctional institutions may be at variance with judicial decisions since the nature of treatment which the offender receives is not within the purview of the sentencing judge. If a parole Board decides on the basis of its own knowledge of the prisoner to release him prematurely, the decision may be contrary to what was originally stipulated. The decision is in pursuance of the discretionary power of the penal authorities who may act independently and even in contradiction to the judicial decision.

III. INTRA-SYSTEM CONFLICTS

Not only there are conflicts between the sub-systems but there are conflicts within each sub-system. They usually manifest as divergent approaches and attitudes but do have considerable impact on decision-making. The lack of cohesion in sentencing is a case in point. Differences in sentencing policies may emerge from operational pressures - lack of information for which the judiciary has to depend upon the other components, but part of it can also be ascribed to the broader influences of the community. Decisions are inadvertantly influenced by

public perception, as well as the socio-cultural background of judges and magistrates. The trend is not confined to the judicial system only. In the police, there is much conflict regarding the laws which it should enforce and the manner of their enforcement. Presently, a controversy is raging among police officers regarding the enforcement of 'social legislation'. This internal conflict is bound to be reflected in the enforcement of certain laws which may be considered vital in the socio-economic context. Similar internalized conflicts emerge from the self-image of the practioners and their attitudes towards certain sections whom they consider as 'weak' or those whom they perceive as potential challengers to their authority. The hierarchical structure of the sub-systems - particularly the police and prison services - contributes to conflict generation at different levels due to differential perceptions.

The concept of judicial independence is intrinsic to the system of criminal justice administration. It is a part of the judicial tradition that no external influence is brought to bear upon decisions. If this immunity, however, thrusts the courts into total isolation and makes them impervious to the demands of social justice, the system may become machanical and lose its social significance. It is said that the judge's role is 'limited in direct intervention' and he acts more as a referee-overseeing the game between

opposing parties. The argument loses its validity in the area of criminal justice, where a criminal accusation cannot be viewed in the light of a 'game' but represents a confrontation between the individual and the state wherein criminal law assumes the mantle of protection of society. Viewed from this angle, judges cannot be insensitive to the social imperatives of the criminal policy.

Much of this conflict is visible in the area of interpretation, and raises some fundamental issues relating to the role of the judiciary. Mr. Justice Krishana Iyer listed the infirmities of the existing court system as insufficient institutional commitment to social justice and reluctance to experiment with more serviceable models of justicing. "The socio-economic milieu of the court system is unfriendly to the poverty sector.....it would be tragic if the law were so petrified as to the unable to respond to the unending challenge of evolutionary or revolutionary changes in society". On the other hand, there is an opposite view expressed by Mr. Justice Khanna: "The task of the courts is to interpret the laws and adjudicate about their validity. They neither approve nor disapprove legislative policy. If an independent judiciary were to take over the role of a crusadeer in the struggle and strife of socio-economic changes, it will cease to be independent".

IV. DISCRETION:-

An important source of conflict in criminal justice administration can be traced to the use of discretion in decision-making at various stages of the process. It may be formal in the sense that it is authorized in the due process of law and vested in certain authorities or informal and prohibited. Since the penal process is related closely to the behavioural patterns of a vast mass of people in widely divergent situations, the exercise of discretion (formal or informal) becomes an integral part of the system. If this marginal relaxation is not available to administrators and judges in decision-making, the entire system of criminal justice is bound to break down. Denial of discretion generates conflict because it can be questioned when exercised under pressure. Much of the intra-system conflicts are the results of exercise of discretion where it is not formally vested in the authorities but which is perceived as necessary and humane. The point has been well made by Davis: "No legal system in the world history has been without significant discretionary power. None can be. Discretion is indispensable for individualized justice, for creative.... justice.... The proper goal is to eliminate unnecessary discretionary power.....".

V. HUMAN RIGHTS:-

Another important area of conflict in criminal

justice administration relates to protection of human rights. In a democracy, the rule of law is paramount, but democracy does not deny the principle of authority or effective enforcement of laws it makes. This raises the question of rights of individuals when brought in confrontation with the system. In our system of administration of criminal justice, protection of rights is intimately linked to the adversarial system derived from the Anglo-Saxon law. It has been noticed that in such a system, the procedural aspects of law will receive greater attention which in turn generate inter-component conflicts and lack of commitment to consensual goals of the system. In a recent study, Bailey pointed out that inquisotorial criminal justice traditions will have greater harmony among the sub-systems than in societies with adversarial traditions. In the Indian context, this assessment is gradually gaining acceptance as witnessed in the procedural changes made in respect of socio-economic offences and suggested for other offences (like rape) which are perceived as sufficiently serious to warrant change. The contemporary perplexities in criminal justice cannot be isolated from human rights in other spheres which determine the quality of life in a society.

VI. SOCIETY AND CRIMINAL JUSTICE:-

The crux of the problem of lack of identity of purpose

among the components of the criminal justice system lies in the fundamental ambivalence of society itself towards criminal behaviour. There are deep difference among the public regarding the nature of crime and the measures that should be taken to control it. On one side, there is fear psychosis of crime and an impatience with the functioning of the system, which is judged by the results of its impact. On the other hand, there is a commitment to liberal doctrines of justice and a movement for humanization of the entire criminal process. These conflicting attitudes are inevitably reflected in the functioning of the system and decision-making at various levels. The models that are adopted in role performance are altered or modified arbitrarily and this leads to inconsistencies in the system. At times (as some recent instances have shown) public pressures are built up to force a change in the decisions even at the highest level. The point at issue is not whether such developments are desirable or not, but to highlight that criminal justice administration can no longer function in a vacuum. The system has to be cognizant of public perceptions and social compulsions and be prepared for meaningful adjustments and innovations which can help in conflict resolution. If it means, changes in law and legal procedures as well as changes in the organizational structure of the components, there should not be any hesitation in accepting them. At the moment, we see only the glimmerings of change.

VII. ISSUES:-

The general implications of conflict are disagreement and hostility, but conflict is not without positive dimensions. In the criminal justice system, conflict at various levels among individuals and groups is inevitable because of individual perceptions, subcultural traits and group attitudes. Indeed, conflict is a necessary adjunct of such a system because without it, the entire system is likely to lose its innovative potential, creativity and capacity for challenging the existing norms and practices which are accepted unquestioningly through sheer inertia of conservatism and dogmatism which are reinforced through submission. Conflict is necessary to enable the components in the system not only to re-examine their goals but also the means of attaing them.

On the other hand, when conflicts are generated and accentuated by social distance, stereotyped images and inter-group hostility, serious distortions in the performance of the entire system are likely to emerge. In a system committed to a common social goal, the orientation has to be cooperative and not competitive. It was found on the basis

of a study of intergroup relations in a system:

> "To the extent that the results have any generality, greater group or organizational ability may be expected when the members or subunits are cooperative rather than competitive in their inter-relationships. The communication of ideas, coordination of efforts, friendliness and pride in one's group which are basic to group harmony and effectiveness appear to be disrupted when members (subunits) see themselves to be competing for mutually exclusive goals".

Although this paper has cited a few areas of inter-component conflict as typical examples, the list is not exhaustive. The purpose of the present exercise is to identify the wider areas of conflict associated with various stages of criminal justice process and to explore ways and means of achieving an optimum and acceptable level of consensus in relation to the primary goals of the system. In seeking conflict resolution, the effort need not be directed only towards conflict elimination, but also to ensure that conflicts which have a positive dimension and consequently necessary for the system are maintained at a reasonable level. Consensus in this context has to be interpreted merely as the process of reorientation of the components with reference to the primary goals of the total system which are perhaps not sufficiently articulated and recognized.

To sum up: the following issues which emerge from the foregoing discussion deserve careful examination:-

1. Identification of the areas of inter-component and intra-system conflicts which have to be eliminated or minimized;

2. Devising a suitable machinery in the criminal justice system to provide the feedback to increase mutual understanding and help in the identification of attitudes which are discrepant with the common goals;

3. Enhancing the problem-solving skills of the sub-systems through organizational restructuring since conflict generation is also due to the structural deficiencies of the components evolved in a particular context; and

4. Elimination of unrealistic constraints in the existing criminal law and procedure through appropriate reform.

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JUDICIAL DISCRETION IN THE CRIMINAL PROCESS

BY

P.M. BAKSHI

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* Pa per by P.M. Bakshi, formerly Member-Secretary, Law Commission of India .

Scope

This paper proposes to deal with judicial discretion in the criminal process. While the importance of such discretion is universally recognised,[1] not many attempts have been made to define its contours, map out its boundaries and locate its milestones, in the context of the Indian criminal justice system.

Discretion in the judicial process

Discretion in the judicial process is exercised by one or other of the various organis participating in the process at several levels. The criminal process is potentially capable of invoked once an offence is committed. But if an offence has been committed, that does not necessarily mean that proceedings against the offender shall be initiated and carried to their logical conclusion in every case. Discretion which effectively controls the initiation or continuation of a criminal prosecution exists within the legal system, although the layman often thinks that the contrary is the case. This feature of our criminal justice system, though familiar to those practising in the criminal courts, is worth academic study and discussion.

The organs that participate in the criminal justice system in enforcement of a validly enacted criminal statute may, for the present purpose, be enumerated as the law

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1. Cf. Davis - "Discretion is indispensable for creative justice."

enforcement agenc y (such as the police), the government, the prosecuting establishment and t he law officers,[1] the courts and the apparatus of corrections. This paper, after briefly mentioning the discretionary role played by some of them, will concentrate on the discretion exercised by courts.

Investigation and prosecution.

When an offence is committed, the police or other appropriately law enforcement agency is ordinarily expected to take steps towards investigation of the offence but the enforcement process may be snapped if the law gives a discretion not to proceed further. Such a discretion exists, for example, where there are statutory provisions for the compounding of offences at the level of the law enforcement agency - a term which should be taken as covering not merely the police but also specialised agencies concerned with the enforcement of the law.

Next, before instituting a prosecution, the law sometimes requires the s anction of the Government.[2] The most familiar provision is, of course, that in the Code of Criminal Procedure which requires the sanction of State Government for the prosecution of public servants not removable except by the Government.

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1. Cf. Note, "Prosectuion by Attorney General" 35 Modern Law Review 347.
2. CF. Note, "Sanctions - Constructive use - Decision to prosecture" 122 New Law Journal 817.

Taking cognizance

Assuming that the law enforcement agency has done all that it has to do towards initiating proceedings in the court and assuming that no sanction is required or that the required sanction has been obtained for the initiation of the prosecution, the next stage to be considered is that of taking cognizance. The power of the court to take cognizance of an offence, though it does not amount to a "discretion" yet pre-supposes the exercise of some amount of individual judgment.

Sentencing and subsequent stages.

Of course, discretionary functions of the court are not confined to the stage of initiation of proceedings; they make themselves manifest at several other stages. Apart from several interlocutory stages calling for the exercise of judicial discretion that regulates the course of the trial even the pronouncement of a judgment of conviction does not, in modern times, nefessarily mean that there is no scope for further discretion.

Withdrawal

Occasionally, the full conclusion of the criminal trial may be interrupted where the power of withdrawal of prosecution is exercised in accordance with law. This may also happen where, even though there is no technical "withdrawal of the prosecution" by the prosecuting agency, the person aggrieved is allowed to compound the offence with the leave of the court. The grant of this leave implies the exercise of discretion as does its refusal.

Judiciary

Coming more particularly to the role of the judiciary in regard to the exercise of discretion, it may be stated that such discretion exists under our system, first, at the stage of taking cognizance of the offence, secondly, at the stage of sentencing and thirdly, at the stage of certain prosecutions for perifury or offences of the nature of contempt of court that might have been committed by a party or a witness. At the stage of cognizance of an alleged offence, the discretion rests mainly on an assessment of the facts; it may not be discretion in the narrower sense, - that is to say, the exercise of a choice between two possible alternative courses which could be adopted on undisputed facts. Nevertheless, an element of residuary power is vested in the judiciary, in as much as the view which the court takes of the facts might fundamentally influence the role of the criminal justice system. The system would remain uninvoked if the court refuses to take cognizance.

Sentenc-ing

Sentencing, in modern times, is a complex process, leaving a number of choices open to the court. Even after sentence is passed, provisions in the Jail Manual for remission on good conduct are operative. Further, there still remain the constitutional and statutory framework concerned with the prerogative of mercy and analogous powers.

Questions of life and death

Discretion in regard to sentencing is now a much discussed topic, but it still seems to bear an analysis in some of its aspects. In the first place, there is the discretion generally available in the shape of a choice between sending the convicted person to prison and imposing merely a fine. Here the discretion is qualitative; no elaboration is needed to demonstrate that the pattern of life and career of the convict may be totally altered once he is sent to prison. Secondly, there is the more important discretion in regard to capital offences where the choice is between life and death. This is qualitative discretion of the highest order. Our legal system, recognising the awesome power which the courts possess when convicting a person for capital offences, has wisely provided for confirmation of the sentence of death by the High Court, - and that too by at least two judges. There is also the further right to appeal to the Supreme Court in some capital cases.

Thirdly, there is, under the penal framework, decision of the question whether a person shall be sent to prison or placed on probation is a matter of the discretion of the court, subject to statutory provisions. Here also the passing of one or the other of the two possible orders would affect the life style of the convict for years to come.

Fourthly, where imprisonment (or fine) is awardable, there is the discretion of the court to specify the period of imprisonment or the amount of fine to be imposed by the sentence.

To some extent, the range of punishment is indirectly regulated by provisions that limit the general powers of the particular court in regard to the quantum of punishment Even then, the range is fairly wide and there is no restriction as to the quantum of imprisonment or fine that can be ordered by the court of session. The more serious the offence, the more wide is the range of the sentencing discretion of the court. This is particularly so in India where (unlike many foreign countries) there is, in general, no minimum period of imprisonment, the cases where the position is to the contrary being mainly of an exceptional character or governed by special laws. This is not the place for discussing whether minimum punishment is or is not a salutary device. A decision to introduce minimum punishment is generally taken by the legislature on pragmatic considerations.

Fifthly, sometimes the law, while requiring that a certain species of punishment (usually, imprisonment) shall be imposed on conviction for a particular offence, does not end the matter there, but also empowers the court to impose what could be conveniently called an additional punishment (usually fine). Here the discretion might acquire a triple character. Imprisonment is mandatory, but its quantum is not (a case of quantitative discretion). Whether, in addition, fine should be imposed is a matter of discretion (this will be qualitative discretion). Finally, if fine is imposed, the quantum of fine again is a case of quantitative discretion.

Restitution

In the imposition of fine, the monetary aspect comes in prominance and it is appropriate to refer to another topic also with monetary significance, which concerns not merely the accused but also the victim. While our law does not, in general, provide for compensation of victims of the crime by the State, it does provide for restitution to the victim by the offender. The relevant provision in the code of Criminal Procedure, though recently clarified and amplified, is not new. Some such provision has been in existence for about hundred years in India though resort to it is now comparatively more frequent. It is therefore relevant to the subject of the present paper to point out that the discretion here is two-fold-whether restitution by the offender shall be ordered, and if so, what shall be the amount to be paid by the offender by way of restitution. In some cases, particularly those of death caused by homicide or other offence, the court may have to decide the persons to whom the restitution shall be paid.

Convicts as human beings

So far, the discussion of the sentencing structure and the discretion conferred by it has been confined to a discussion of the position in India. If one has a look overseas, we find that the number of sentencing alternatives open to the court is worth study. Criminological thinking in this sphere has taken note of the fact that a court

ordering a criminal conviction deals with men, women and children in flesh and blood, and not with dumb characters to be handled mechanically. We may call it a more sophisticated version of the theory of individualisation of punishment, or we may call it by any other name ; but the essence of the matter is that each convicted person is to be treated as an entity and not as a botanical specimen to be classified, catalogued and consigned accordingly to the appropriate pigeon-hole.

Human approach- analogy from civil cases

One may find illustrations of this human approach in some other situations which present themselves to the court in civil matters, particularly in family law. To whom, for example, the custody of the child shall be awarded in a divorce proceeding? How much time shall the child spend with each of the parents? Who will determine their education and upbringing and what will be the number and frequency of visits of each parent to the child ? If the child is to be placed at school, which school shall it be ? It is obvious that the determination of such questions in proceedings under family law legislation involves issues not of law or of fact, but what should be really called questions of judicial wisdom. No amount of learning in law or accuracy in the collection and assessment of factual material would do far arriving at a satisfactory decision in such matters. It is this aspect which marks out areas of judicial discretion from all other

areas falling within the functions of the judiciary. The judge here does not merely reconstruct the past (as he does in recording evidence for ascertaining facts), nor does he conduct research into the law and apply it to the facts. These two processes are scientific and intellectual in character, while areas of judicial discretion cannot possibly be described as scientific or intellectual. Material gathered with the help of scientific knowledge or as a result of intellectual labours may, no doubt, be usef ul in the exercise of the discretion - expert psychiatric testimony, for example, where the welfare of the child is to be adjudged; but the ultimate decision must rest pre-eminently with the judge. Long Long ago, Cardozo, speaking of the judicial process, said that the process in its ultimate reaches is not discovery, but creation. How true this statement is of the judge when exercising wise judicial discretion.

Illustrations from other fields of law

In order to emphasise the discretionary role of the judge, it would be permissible to draw illustrations from other fields of law, which will illustrate what is often pointed out, namely, that the idea that judges represent, as it were, the "blind-fold figure of justice, brooding over a machine" [1] is not accurate. As has been already pointed

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1. Dias, Jurisprudence (1976), page 293.

out above, in a very large number of cases, some choice as to values is inescapable. Holmes referred to this aspect and observed[2] that the very considerations which judges most rarely mention, and always with an apology are "the seeret root from whic h the law draws all the juices of life".

A learned writer[3] on jurisprudence has enumerated the principal yardsticks by which conflicting interests are evaluated by judges. Tentatively, he would list them as national and social safety; sanctity of the person; s anctity of property; social welfare; equality; c onsistency and fidality to principal doctrine; morality; convenience and international comity. It will be too much to say that the list given above is exhaustive or that these criteria are always articulated by a judge when exercising discretion or that all of them are relevant to the disposal of a criminal prosecution or matters arising in the course thereof. But it would be desirable to point out that a study of how far a judge acting in the concrete has applied one or more of these criteria in a criminal prosecution would be an interesting exercise from the socio-legal point of v iew.

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2. Holmes, The Common Law, page 35.

3. Dias, Jurisprudence (1976), page 260

Finally, as Lord Wright said,[1] "Notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice".

Supremacy of Judge

This, then, is the essence of judicial discretion. The judge rules supreme in the ultimate. Something of divinity resides in the Bench when it dispenses discretionary justice.

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1. Lord Wright, Legal Essays and Addresses, page xxv.

POLICE, JUDICIARY AND CIVIL LIBERTIES IN INDIA

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Democracy in the countries of the developing world confronts a very serious 'crisis of crises.' One such crisis in the series is the rejection of Institutional grafts, leading to the crises of compatability and viability of the political system. The concept of fundamental rights or civil liberties constitutes the core component of the 'basic structure' of the Indian constitution. The notion of rule of Law, which the British System of jurisprudence and criminal justice evolved in the colony had its inherent contradictions, which free India has further sharpened into intra-system conflicts and sub-system incongruences. The colonial system did not even profess to assure and still less guarantee civil liberties. Naturally, the police could conveniently continue as 'an Executive Arm of the state' without offending the "Limb of Law" notion of the policeman. The accusatorial or adversarial philosophy dominanted penology and judiciary was postulated as Third party, arbitrating or adjudicating between the individual and the state. Logically therefore, the police representing the executive agency of the government and the Judiciary embodying the notions of classical justice started working at cross purposes and developed contradictory processes and self-defeating procedures.

The new democratic ethos of the citizen finds his civil liberties in jeopardy. The electoral politics of adult suffrage has increased his awareness and heightened pressures on the Executive to rectify the systemic contradictions in the areas of police working and judicial functioning. The present paper proposes to identify some of these gaps and incongruences in the working of police and Judiciary in the field of civil liberties in India. It further highlights the bottlenecks and sub-system conflicts resulting in the casulty of fundamental freedoms. Towards the end it essays to suggest measures and mechanisms to minimise some of the self-defeating procedures that threaten the emjoyment of civil liberties. The paper has developed a paradigm that "The ensurement of Civil liberties to citizens through enlightened executive and its coercive arm is a better democratic alternative than their guranteed restoration through an independent judiciary, committed to static procedures established by law.

I

Prof. Allen Gladhill in his celebrated book 'Republic of India' congratulates India for her heroic reaffirmation of faith in the philosophy of liberalism, enshrined in chapter Third of the Indian Constitution. We all take pride in the profession and practice of seven Fundamental rights, including the Right to constitutional Remedies, which provides meaningfulness and relevance to the remaining six rights.

The judicial gurantee assured as a constitutional mandate is regarded as a prize possession of the Indian citizen. But then, seldom has this been emphasised that in a developing society of India's size, poverty, illiteracy and tradition the mere provision of restoration of violated liberties has little meaning, if the executive arm of the government countinues to be ruthless, irresponsible and even arbitrary. The preamble of the Indian constitution rhetorically talks about the "Dignity of the Individual" which in any civilized society implies:-

a) The acceptance of self respect of the individual;

b) The basic security of his person and being;

c) The recognition of his social accomplishments;

d) and the need of assertion of his distinctiveness and uniqueness as a person of consequence. Obviously, the acceptance of this noble notion of the individual requires the instrumentality of an enlightened executive, more specially the police which represents the coericive structure of authority of the state. The adversarial philosophy of Jurisprudence pitches the organisation of the policy against a Neutralist judiciary whose decision and sentencing policies can be well anticipated by a skilled policeman during the course of his investigations and preparing papers, which in a way is a quasi-judicial activity. Working in Unision the policeman and the judge have a common goal i.e. implementation of law, dispensation of justice and Maximisation of civil liberties of the citizens. But the two do not preceive their

roles in an identical fashion. The former dreeds bails and objects to anticipatory bails, while the latter distrusts the evidence of the enthusiastic policeman and treats him as partisan. This inadertantly pushes the policeman into a situation where in he may make civil liberties non-enjoyable, if not available. The Indian constitution devotes clauses after clauses to ensure judicial freedom, propriety and uprightness, while it has ordained pretty little to evolve a police system or executive mechanism conducive for the enjoyment of civil liberties. The constituent Assembly was happily dominated by the legal luminaries and statwards of freedom struggle. It somehow contented itself by devising a judicial structure of independent courts and judicial guarantee to fundamental rights which to a considerable extent has proved counterproductive in the givens' of Indian society in general and Indian Police organisation in particular. The basic postulates or democratic assumptions behind the scheme of fundamental freedoms in the constitution of India seem to be that:-

a) The citizens know and value their civil liberties and a system of open brain-trade in the bar can supply protectors of rights to the prospective Buyers.

b) The avail ability of an independent judiciary is a sufficient condition precedent and a Bench which can restore civil liberties to the aggrieved is a reasonable bbt work against the tyranny of the executive and its police prowess.

c) The citizens who want to enjoy freedom and value its worth must pay some price cheerfully and even if they become victims of the executive wrath in the process this eternal vigilence is the price of their liberty.

d) The accusatorial philosophy of justice is better than the Inquisitorial philosophy where in summary trials and absence of vakils spell disaster and cause miscarriage of justice.

Needless to say this is too 'Elitist' a concept of the Bar, the Bench, and the citizen. The adversarial philosophy keeps the Blue books in a state of incongruence with the order of social change. The crime of Rape, which is the most blatant denial of 'dignity of person' to a woman is still being restored to her by enhancing years of punishment and amendment in the system of evidence. The instrumentalities of Bar and Bench are increasingly becoming inadequate (if not ineffective) to enthuse the citizen about his own dignity or that of his neighbours. The indignities perpetrated on the citizen by the government and society in the wake of social change and economic growth are too many and too complex that even the most independent Bench and an easily accessible bar can not protect him from the onslaught of the executive and from the atrocities imflicted by the fellow citizens. The socially strong can circumvent the processes of legal justice by abusing the wide variety of discretion available to the guardians of law and order. The countervailling power

of the Bar and the Bench is a frail check as it can easily be duped by the manipulation of the procedure.

II

The Indian society even after 33 years of independence continues to be a loose conglomoration of sub-societies or exclusive communities of factional nature. The tensions between the rich and the poor, the Urban and the rural, the educated and the illiterate, Men and women, socially strong and traditionally under privileged, are too severe and too explosive t o allow peaceful enjoyment of civil liberties. The seven fundamental rights, notwithstanding their judicial guarantee, by the large continue to be prerogative of the privileged few. The justice system besides being prohibitive, encourages the average and the week to suffer in silence. The political V.I.Ps or those courts, where rhetoric apart, justice is an expensive commodity for which the aggrieved has little desire to purchase and leisure enough to chase in the jungle of judicial procedures. The fundamental rights like the 'Right against exploitation' and the 'social and cultural rights' seem like bare minimums in the area of civil liberties. But the casualness with which blatant violations of social legislations are handled by the police and much less by the judiciary, is a pointer towards the state of civil liberties of citizens, especially the members of scheduled castes and scheduled tribes and other weaker sections of Indian society.

The priorities of police work leave little time and almost no resources with the policeman to jealously guard these basic freedoms in normal course. Contrary to this, even a milkd tempering with the right to freedom of the privileged under M.I.S.A. or COFEPOSA produces a lot of noise and hits the head-lines. The police and the executive are restrained, while the weak and the poor continue to languish as under-trials even when atrocities are committed by those who are expected to protect them. The Blue Books have an obvious tilt in favour of the rich, the powerful and the vested interests. The evidence system is discriminatory and laws pertaining to parole and A.B.C. classes in Jails militate against the principles of Natural justice. An appeal to Bar is almost a precondition to obtain justice from the Bench and the classes of vakils are available to the classes of clients in commensurate to their socio-economic status in society. Moreover, the quasi-political status of the Indian police can create conditions in which even the judicial redressal of the Political Wrongs might prove too difficult to attain.

The great hiatus between the theory and practice of Rule of law in India is a cross breed product of 'liberal philosophy' and 'colonial interests' which the Britishers strived to reconcile. The judicial and police systems epitomised these incompatible components of Indian Administration. Civil liberties being denied to the Indian masses, the

myth could be perpetrated to keep the system going. Gradually the procedures got putrified and the 'elite class' developed a vested interest in the system of privileges, so blatantly denied to the massess. Today when the colonial interests do not exist and the civil liberties are professed from house tops the Indian elite is in a position of indefensibility to continue with the incompatibles. Yet, no major break-through has been attempted in the area of law enforcement. The colonial structure and philosphy of Indian police is vociferously defended in the name of political stability and national integrity of the country. The judiciary has been saddled with an extra responsibility of defending the constitution and portecting the fundamental rights of the citizens. To this the new role of the legislators and the administrative discretions enacted in the legislations of recent past add further confusions to the predicament of the poor and the weak. The infra-structure of Indian polity has failed to grow as its support-structure and in the absence of conscious people, vigilent press, strong political opposition and social responsibilities of judiciary, the citizen confronts indignities, disrespect and humiliation whereover governmental agencies are involved. The police maltreats him because of the difficult functions and sensitive responsibilities it has to discharge. The judiciary treats him as a humble fry because he can not read laws, and is too

weak to defend himself by adducing evidence or procuring an anticipatory bail through the open-market services of the Bar. In sum some of the major threats to the civil liberties of citizens in India can be listed as under:-

a) Legislative enactment like MISA, P.D., COFEPOSA/ and D.I.R. which leave a lot of discretionary pockets to be exploited by the executive with out invoking effective refrainment by the judiciary.

b) 'The Executive Arm Notion' of Indian Police, which generates risky relationship of 'overloyalism' and Personal Commit-ment' of police officers to the Political Executive. The recent developments in this area not only demorlise the consensus among police offic ials but encourage the political masters to abuse and misuse the power of the police. This ultimately results in a growing menace to the civil liberties of the citizens in general and political opponents in particular.

c) The balance wheel concept of the judiciary treats the executive wing of the government at par with the aggrieved citizen, who is presented to its saneta Sanctorium' as an accused or as a suspect in a given case. Ideology and procedures apart, the judiciary in India stands fortified by the privilege of 'contempt of court' and has little pressure of public opinion to put its own house in order. Consequently the under-trails are lenguishing in sub-human conditions of Indian Jails for years and decades. And amusingly enough all

this has happened under the procedures established by law.'

d) Complexity, delay, and cumbersomeness of legal procedures, involving huge costs act as positive constraints in the enjoyment of civil liberties in all democratic societies. But in India these procedures, besides being goal defeating, are specially tilted to the advantage of the rich, the powerful, and the privileged. The adversarial philosophy of justice has evolved a sacred procedure according to which women, minorities, and members of weaker sections of society find it difficult to lead a life of individual dignity, self-respect and human freedom.

e) In the developed societies of the Democratic West the civil liberties of citizens are ensured not only through an independent judiciary, but also through a highly enlightened and skilled organisation of their police forece. The latter is constantly kept on its toes by vigilant political parties free press, militant opposition in legislature and a free-play of articulate public opinion in the society. The Watergate debacle is an example in point where the press played a role as illustrious as that of the judiciary. In developing countries of the non-west the frugality of this infra structure encourages the executive to be arbitrary and more judiciary is too frail a sub-structure to guarantee freedom or ensure civil liberties consistent to the 'dignity of the individual.'

These threats to civil liberties are fairly genuine and perhaps some what unavoidable in the evolutionary process. The cure lies in strengthening the support-structures of democracy, especially the press and the political parties. But then, till this 'Desirable' happens, can some thing institutional be done to 'ensure liberties' in addition to their mere restoration through independent law courts? In my judgement some of the following measures can prove helpful in enlarging the 'oases of freedom' in the wild wilderness of class tyranny and mass exploitation.

1. A thorough overhaul and total change in police philosophy, police organisation, police Behaviour, and police procedures of work can be attempted with courage, vision and perspective. Piecemeal reforms in developing societies slow-poison the system and create anchronistic structures of dysfunctional nature. Sir Robert Peal carried out a 'Citizen police' of Boby variety out of the bands of brigands operating in the slums of London. The political will alone can shape a depoliticised, decentralised, autonomous, and management-oriented police system in India and nothing short of it can ensure, and still less guarantee civil liberties to a technological society of 21st century India.

2. Once the police is prepared to ensure liberty and dignity, the judiciary will have an easier job of restoring the violated freedoms. Here also in addition to the

creation of new structures of legal aid and speedier and cheeper justice to the weak and the poor. We have to strengthen the intellectual calibre and moral fibre of the Bar and the Bench. The falling standards of legal education have to be reviewed. The respectable members of the Bar have to be protectors of causes and fighters for laudable ideals. Legal lumanaries ith roaring practice at the Bar can not ensure civil liberties to the masses. Similarly, the social responsibilities to the masses. Similarly, the social responsibility of Judiciary has to be viewed as a non-ideological issue from the 'Iyer'and'Khanna' Schools of Indian judiciary. In a socially-unjust society like India the Bar and the Bench have to develop new concepts of Time-Bound Justice, summary trails in minor cases, local justice through panchayats and higher professional ethics of the specialist variety.

3. Procedures of police work, judicial trail, and sentencing policies of today are the product of a classical philosophy and are obviously attuned to the objective as perceived by the authors of the Blue Books of Post Mutiny India. Mere amendments and minor tinkerings here and there in the light of public disorders and judicial precedents can not update them. Actually they can not administer a pregnant society facing threatened abortion. They need a reauthoring of the text and newer vision of a non-western society. Provisions like 'Cognizable' and 'non-cognizable

offences, Bailable and non-Bailable crimes, compoundable and non-compoundable offences, A.B. and C classes in Jails, parole systems, Methods of attestations, status of the witnesses, expectations of popular coperation from a lay citizen, distrust of the policemen, insularity of the judiciary from public criticism are some of the areas where in serious and sober democratic debates are warranted to call out new ideas and systems, functionally suitable to Indian genius. This is a job which the law commission by its very composition is quite seriously handicapped to accomplish.

4. Lastely the enlightened citizens have to organise and articulate public opinion against all sorts of injustices. The police and the judiciary in their ultimate have to be answerable to the people. But the instrumentalities of this responsiveness and responsibility have to be different. An associational society is the surest insurance for democratic liberties. The judiciary and the police at best can help, but to place the two under a system of eternal vigilence of public spiritedness is the 'order of liberty' which according to J.S. Mill implies "the power to expand - the choice of the individual way of life without imposed prohibitions from with out."

Thus the entire dichotomy between the executive and the judiciary in the field of criminal justice and civil liberties is a fallacy. To view it further as a

'battle of wits' between the citizen on the one hand and the executive might of the state or the government on the other hand is a mistaken view, which may ultimately imply the curtailment of reasonable freedoms of both at the hands of the judiciary. The judiciary after all is not a non-government agency, nor can its indepdence as a third party ipso-facto guarantees individual freedom. The police and the judiciary run a rally race and one partner can easily put the team in the Red. With the spread of democracy and strengthening of its support - structures, people will extract their fundamental freedoms from the government and will jealously guard them against the onslaughts of all authority: legislative, Executive and judicial. But then, till that glorious day dawns, let, us reshape our 'force of order' into a 'citizens police' and expose our 'Opaque House of judiciary' to 'Pressures and constraints of social Change', which are violently rocking the floors of our legilatures every day.

NATIONAL SEMINAR

On

DECISION-MAKING IN CRIMINAL JUSTICE SYSTEM

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LOVE all, hate none, is a good ideal for the Society. But we do not find such ideal in the practical life. We find always some disturbances in the Society right from the evolution of the Society. Some members create nuisance and disturb the peace of the society by their mis-deeds by violating rules for the peaceful existence of the Society. There are rules either codified or uncodified.

2. In the earlier days, there was monarch and monarch was the fountain source of all powers including punishing the guilty members of the Society. in India, we have followed the English method of doing criminal justice. In England, there has never been the doctrine of the separation of powers. The Crown is the fountain of justice and the origin of all justice is the will ofthe executive that justice be done. When Jethro, the father in law of Moses, considered that Moses, who was 84 years old, was working too long hours (from the morning until the evening' sitting in judgment and wearning himself away. he advised him to appoint able men to sit in his place and judge the people at all seasons. That is how the institution of Judges came into existence.

3. In the course of time, there have been four institutions whose business had been to obtain proof of the commission of the crime and to institute the prosecution that follows, They were the Judge and Grand Jury, the Cornoer and his Jury, justices of peace and the police.

4. With the gradual change the Judge no longer inquired about the commission of the crimes from those in the neighbourhood who were supposed to know. Consequently, it had to be somebody else's business to make the inquiry and lay the results of it before the grand jury. As it appears that in the beginning, this work was done by number of different people. The parish constable was a rudimentary form of policemen. The job was unpaid, and the members of the parish were selected by rotation to discharge it. No doubt the constable made an arrest when the accusedwas caught red handed but he can hardly have done much in the way of investigation. This heavier burden was assumed by tge Justices of the peace, and as Sir William Holdsworth has called them as "men of all work", While the justice of peace required into the local crimes, offences of state were looked into by higher servants ofthe Crown by the Secretaries of State and in the Privy Council. Ultimately, work of collecting evidence by investigation was given to the police.

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5. Looking to our Indian Law also which followed the pattern of English method, the same principles have been embodied inthe procedural law. It is true that the presents police is originated with the parish constable. He is fore-runner rather than an ancestor. His duty is to keep order and to investigate as per the powers conferred on him. Under the provisions of the Criminal Procedure Code, the police is authorised for collecting evidence into the commission of certain offences. Still however, certain provisions to regulate the power of interrogation has been made as we find in saction 164 for recording confession in Criminal Procedure Code as also in section 24 and 25 of Indian Evidence Act the prosecution is not allowed to put in evidence any confession made to the police officer. But section 161 authorises the police to record statements of witnesses, but section 162 makes them inadmissible in evidence except statements like dying declaration and for contradiction purposes as provided therein.

6. In the working paper entitled "Consensus and Conflicts in Criminal Justice Administration-some problems in Decision-making" it has been rightly pointed out that there are three components of the criminal justice system. They are police, judiciary and correctional services and the role of the police.

has been set out as maintenance of order and prevention and detection of crimes. The role of the judiciary is perceived as adjudication and interpretation of law. It has been also pointed out that in the adversarial system of adjudication, the law enforcement agency which is really an integral part of the justice ensuring system is reduced to the position of an interested contestant in the dispute. It is a situation in which inter system conflict is inescapble due to the element of distrust a consequence of inadequate appreciation of roles. The fact that this mutual distrust is institutionalised in legal procedure does not in any way reduces the potential for conflict, and an example is given of institutional stigmatization in making inadmissibility of statements made before the police in the course of investigation.

7. I would like to concentrate on this aspect and before I proceed to consider the relevant provisions of Criminal Procedure Code, I would like to point out that we should not forget that the whole procedure is meant to see that ultimate justice is delivered to consumer of criminal justice viz. the accused, and we should examine the suitability or otherwise of the amendment in the present position of law with regard to the admissibility of statements vis-a-vis the accused also inasmuchas the accused will have to

go in jail or be set free. It is a question of the liberty of the human being and when the Government intervenesin his life, it is literally his life that is involved and, therefore, that important aspect before suggesting any change in the present procedure should not be over-looked.

8. It is true that the police are only part of the machinery of prosecution. In ordinary sense they initiate prosecution and gather materials for it. When the police officer is trying to discover the author of the crime, there is no objection to his putting questions in respect thereof to any person or persons whether suspected or not from whom he thinks that useful information can be obtained. So far, this aspect is concerned, the policemen should be free from judicial interference and infact they are free from such judicial interefference since he is performing his administrative task of detection and has not begun the legal work of prosecution.

9. The second phase of this inquiry begins when the suspect becomes the accused and if thereafter the questions are asked to the accused to obtain proof against him by means of admission, certainly it would make a proper subject of judicial restraint and that has been done by the above mentioned provisions of Criminal Procedure Code and the Indian Evidence Act.

10. But it is very difficult to find out the test when the first phase comes to an end and the second phase begins i.e. when the suspect becomes the accused and in real life it is a difficult case. For example,

when man has been assaulted or woman raped, the individual alleged to be the criminal is often identified and the there is no question of charging any one except him. But the police cannot arrest him until they have reasonable ground for thinking not only that he committed the alleged act, but also that he was guilty of the crime. So the first interrogation with him would be inevitably on the basis that he is a suspect. In the interrogation if he admits that he was a person involved, he may say in the case of rape that the woman consented or in the case of assault that he was acting in the self defence. It then becomes the duty of the office to check his statement recording the statements of the other persons. Thus the police is doing the two-fold task of ascertaining whether he is guilty and of collecting evidence which if he is charged will be used to prove his guilt. In such cases, it is difficult to know where to draw the lise. However, when the police becomes sufficiently convinced of his guilt that the subsequent inquiries are directed towards acquiring legal proof of that which they already believed. It is, therefore, clear that whenever the evidence in possession of the police has become sufficiently weighty to justify a charge, the charge is for this purposes treated as having been made and the suspect is thereafter treatedas an accuswed.

11. Now the bar of section 162 of Criminal Procedure Code for the admissibility of the police statement of witnesses cannot be considered in absence of section 161 of Criminal Procedure Code. It may be noted that under our Indian Law, under section 161, of the Criminal Procedure Code, Police has power to examine oreally any person supposed to be acquainted with the facts and circumstances of the case and it is also lad down in sub-section (2) thereof that it is the duty of such person to answer all questions relating to such case put to him by such officer except the question which tend to expose him to a criminal charge or to a penalty of fore-neature and sub-section(3) of section161 clearly provides that police officer may reduce into writing any statement made to him in the course of examination under this section. It also further provides that if he does so, he shall make a separate and true record of statement of each such persons whose statements he records. Section 162 of the Criminal Procedure Codeprovide that no such statement made to the police officer if reduced to writing be signed by the person making it and it further prohibites the use of such statement or any part thereof at any inquiry or trial in respect of any offence underinevestigation at the time when such statement was made subject to the exceptions made out in the proviso of the said section.

12. It is pertinent to note that through such statements are not to be used in any inquiry or trial for the offence under investigation, even so, Magistrate as well as the Sessions Judge can look into the record of the case including the documents submitted for the purpose of framing of the charge. It is, therefore, clear that it can be used for the purpose of framing of the charge and to that extent there is consensus between police and the judiciary.

13. The very object of putting the bar of section 162 is to see that the accused may not be prejudiced in any way by the improper use of such statement recorded loosely or inaccurately by the police and, therefore, the object is to protect the accused both against over zealous police officers and untruthful witnesses. As stated above, it is not obligatory for the police officer under section 161 to record the statements of the witnesses in writing or to get it reduced in writing. Thus, apparently, the object appears to be a loudable object of giving protection to the ultimate consumer of criminal justice.

14. It is pertinent to note that in view of this bar under section 162, it cannot be used as a substantive or corroborative piece of evidence. Still however, the total use thereof has not been prohibited

in as much as it can be used for the purpose of contradiction by the accused with the permission of the Court and also by the prosecution in re-examination of such witness for the purpose of explaining any material referred to in the cross examination. This again discloses that the judiciary is not against the investigating agency.

15. It may also be noted that all actions of the Police are not distrusted. When the police records FIR for the cognizable offence under section 154 of the Criminal Procedure Code, it can certainly be used under section 157 of the Indian Evidence Act for the purpose of corroboration and it can also be used for the purpose of contradiction, but certainly the said report cannot be used as the independent evidence. Thus, this is one additional point when the judiciary and the legislature do not distrust the police.

16. It may be noted that so far as judiciary is concerned, the judiciary has no bias and/or prejudice as such against the police particularly because it is working as the investigating agency and merely on account of their working as the public officers as such is no ground for discarding their testimony. At this juncture, it would be useful to refer to the observation made by the Supreme Court in the case of

STATE OF KERALA vs. M.M.MATHEW AND ANOTHER, REPORTED IN AIR 1978 SUPREME COURT AT PAGE 1571. In para 3. Their Lordships have observed as under:-

> "It is true that Courts of law have to judge the evidence before them by applying the well recognised test of basic human probabilities and that some of the observations made by the Sessions Judge especially one to the effect that the evidence of officers constituting the inspecting party is highly interested because they want that the accused are convicted "cannot be accepted as it runs counter to the well recognised principle that prima facie public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case."

17. At this juncture, it is also equally important to note that though section 162 provides a bar for the use of the statement under section 162, for any purpose at inquiry or trial in respect of any evidence under investigation, still however, under section 165 of the Indian Evidence Act, the Judge has power in order to discover or to obtain the proper proof of the relevant facts to put any question in any form at any time to any witness or the parties, whether it be relevant or irrelevant, but only provision is that the judgment of the suit be based upon the facts delivered by this act to be relevant and duly proved. Thus, this power given to the Judge also clearly speaks that because of the bar to the use of the statement under section

162, it cannot be said that there is any conflict between the Judge and the Investigating Officer in as much as with a view to find out the truth the Judge can look into the statement though he may not use it for the purpose of his judgment and upon such statement he can put or suggest to the advocate for the accused any question to the witness for contradicting the witness.

18. It is also necessary to note that on account of the bar of section 162 certain difficulty questions also pose before the Court as to whether a particular conduct of the accused or witness even a gesture amounts to a statement and whether it is hit by section 162 or not. As per example, when the police officer asks certain questions to the accused and if he is trembling or has become nervous, whether this would amount to a statement or not, See Prakashchand's case reported in AIR 1979 Supreme Court page 400. Similar such questions also arise for the identification parade and its panchnama which is recorded in the presence of police. See AIR 1955 Supreme Court page 104 Loyd's case. Looking to these circumstances, it is necessary to seriously consider as to whether the present position of law requires any change or not. It is pertinent to refer to observation of the Supreme Court in case of Gian Singh Vs. State of Punjab reported in A.I.R. 1974 Supreme Court page 1024 as under:-

> "We are aware of the exaggerated criticism of police force as a whole and of the reluctance of the framers of the Criminal Procedure Code to

> trust statement by police investigators but these are partly at least, the hang over of the British past."

19. Before we consider that aspect, it may also be noted that any person can move the Court by instituting a complaint for the alleged commission of the offence. In the complaint he is also giving the names of the witnesses and if there is any previous statement of such witness, that statement can be used in order to corroborate his version. But if the police investigates that very offence and records his statement though a previous one, cannot be admitted in evidence even in order to corroborate his version. We have noted above that the loudable object is to protect the accused both against the over zealous police officers and untruthful witnesses. At this juncture, it is necessary remember that there are number of rules for appreciating the evidence enunciated and expounded by the Supreme Court and some of them are the probability of the version being correct, the nature of the evidence, credit-worthiness of the deponent, and many others. It is useful to note the observation of the Supreme Court made in the case of INDERSING AND ANOTHER VS. DELHI ADMINISTRATION, REPORTED IN AIR 1978 SUPREME COURT PAGE 1091 as under :-

> "Credibility of testimoney oral, circumstantial depends considerably on a judicial evaluation of the totality, not isolated scrutiny."

So, it cannot be said that merely because the statement of the witness in a criminal case is allowed to be used as a corroborative piece of evidence, that would in any way

come in the way of proper appreciation of evidence. If the bar of admissibility is the only check available to avoid the version of the untruthful witnesses, the matter would have been different. But that is not the test in as much as many prosecution witnesses are held as persons not telling the truth inspite of the bar of section 162. At the time of appreciating the evidence, the Judge has not merely to look at the statement itself, but has also to know the human psychology and appreciate it in the background of the circumstances of the case as he has to deal with various types of the witnesses., might be eye witnesses, might be child witnesses, expert witnesses, hostile witnesses, etc. and, therefore, at the proper time, the proper cannon of appreciating the evidence is to be applied. Under the circumstances, if the statement of the witness, even recorded during the investigation by the police, is used as corroborative piece of evidence, like FIR and also for the purpose of contradiction, that would not in any way increase the burden of the Judge in finding out the truth from the version of the witnesses.

20. In view of the above discussion on the different aspects, now it would be useful to consider that so far as police is concerned, as stated in the working paper, the role of the police has been set out as maintenance of order and prevention and detection of crimes. This work is a very heavy work of the police. The present time and circumstances demand that there should be division of the police force. One division should be

and the second one should be on the detection of the crime viz. investigation. It is also desirable that there should be sufficient safeguard in the provisions of the Criminal Procedure Code and/or the Police Act against the over-zealous police officers and that can be done by proper verification of the statements recorded during the investigation by the superior officer. In no case, verifying officer should be of the rank below the police inspector and in the case where the police inspector has carried out the investigation, it should have been verified by D.S.P. Second safeguard which is suggested is before placing charge sheet, police Department should also obtain opinion of the the Assistant Public Prosecutor working in the Taluka Town and when there is offence exclusively triable by the Sessions Court, after obtaining the necessary opinion from the Public Prosecutor. I would also like to suggest that the entire Investigating Branch including D.S.P. of the Investigating Branch and all Public Prosecutors should be under the direct control of the Director of Public Prosecution, who should be working under the Legal Department of the State. This suggested change would certainly protect the accused from over-zealous police officers.

21. The further change which is necessary to be suggested is that there should be amendment in section 161 and 162 of the Criminal Procedure Code and that it would be obligatory on the investigating officer to record statement in writing of all the witnesses and to obtain their signatures, or thumb mark, if they

are illiterate, in token of reading over the same to them and delivering a copy thereof immediately to the concerned witness. This would rather protect the police from the allegation that the police has not recorded and/or has wrongly recorded the statement. Similarly, it would also help the Judge because the evidence of the witness is to be corroborated by the statement which is made immediately after the commission of the offence. The accused can certainly fully cross examine the witness and if in any case he is in a position to point out any infirmity in his evidence, either on account of contradiction or on account of improbabilities of his version, or impeaching the credibility of the witness, he can successfully ask the Court not to accept the version of the witness.

If the above suggestions are considered by the Legislature in the proper perspective and carried out possibly it would lessen the area of conflict between the police and the judiciary and that would create the atmosphere of co-operative working by the different components who are doing the work of administration of criminal justice.

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GOALS OF CRIMINAL JUSTICE - DISTORTION OF PRIORITIES UNDER THE INDIAN SYSTEM

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For several decades now the criminal justice system of this country has been under tremendous strain. Rooted in the conservative and abstract tradition of an alien conceptual framework, it has failed to respond to the needs of the Indian society. The colossal failure of the system is reflected, on the one hand, in the stupendous growth of crime and lawlessness, and on the other, in the mounting arrears of criminal cases pending in High Courts and the Supreme Court, on a conservative estimate, in the beginning of the year 1979 more than 72 lakh cases were pending in subordinate courts of which as many as 46 lakhs were criminal cases. These facts abundantly reflect the wide chasm between the theoretical pretensions and operational realities of our outmoded ystem of criminal justice.

2. To my mind, the police, the lawyers and the judiciary are the three most important components of our criminal justice system. And if the system is tottering today the blame must be shared by these three major constituents. It is no use blaming only one or two components.

3. The inter-relationship between the police and the judiciary has certain inherent contraditions

some of which are unavoidable and must be accepted as honest differences of opinion based on different environment and value systems. But unfortunately these contraditions and conflicts have been on the increase and now threaten to acquire hostile over tones. As far as the police are concerned, the primary goal of the criminal justice administration is the control of crime and reduction of criminality in the society. Ordinarily this should also be the goal of the judiciary. But differences arise between the approach of the police and the judiciary to this goal of crime control and reduction of criminality because they perceive their roles differently. While the police believe that crime control is by far the most important objective of the criminal justice system, the judiciary in this country holds the view that the goal of crime control and reduction of criminality is only secondary and that the main objective of the system, or at least of the courts, is to safeguard the rights and liberty of every individual. This lack of identity of purpose between the police and the judiciary has contributed in no small measure to the emasculation of the system.

4. While assessing the role performance of the police it may be borne in mind that they are much more intimately involved, both physically and emotionally, than the courts, in the task of crime control and reduction of criminality. They are the ones who handle specific criminal offences, see the

condition of the victims and are charged with the responsibility of arresting and prosecuting the criminals. In a free society the value system of the police is bound to be influenced and conditioned by the societal demands for effective crime control. They are also subjected to and influenced by the press criticism and emotional responses of the community to repititions of violence. But in the absence of intimate personal contact with crime and criminals, the law courts tend to be theoretical, abstract, and at times, even indifferent.

5. Here it would be worthwhile to quote George L. Kirkham, a Professor of Criminology in Florida State University, who opted to join the Jacksonville Police. His experience as a policeman radically altered some of his earlier ideas about the police, the criminals and victims of crime. He observed : "I found that there was a world of difference between encountering individuals, as I had, in mental health or correctional settings, and facing them as a policeman must : when they are violent, hysterical, desperate. When I put the uniform of a police officer on, I lost the luxury of sitting in an air-conditioned office with my pipe and books, calmly discussing with a rapist or armed robber the past problems which had led

him into trouble with the law".[1] "Such offenders had seemed so innocent, so harmless in the sterile setting of prison. The often terrible crimes which they had committed were long since past, reduced, like their victims, to so many printed words on a page."[2]

6. In principle, there can be no two opinions that the legal procedures followed during investigation and prosecution of crims must be consistent with the rights of the individual, even if he is a criminal - because in the eyes of the law he is innocent, unless his guilt is fully established. But how are the police to function if the system itself is designed to distort the entire process of investigation by placing legal impediments in the way of prevention and detection of crime by raising statutory presumptions against them at every stage? If I may say so, some of these legal provisions treat the police as greater suspects than the criminals. Under such conditions how can the system succeed!

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1. George L. Kirkham, "A Professor's Street Lessons," F.B.I. Law Enforcement Bulletin, March, 1974, Page 6.

2. Ibid.

7. Nowadays it has become fashionable to criticise the police and deliver sermons on the inviolability of the freedom of the individual, even of notorious criminals. All this is sought to be done in the name justice, liberty and rights, mostly of the accused, but seldom of the victim or his family. Apparently, due to the deep imprints of an alien legal culture our sense of justice has narrowed merely to ensuring that no injustice was done to the accused. In the process the elementary requirement of dispensing justice to the victim of the crime and to the society at large seems to have been blurred, and even forgotten! The result of this distortion has been that in most criminal cases the entire effort of the jurists and lawyers is directed at protecting the so-called individual rights and personal liberty of the accused, often in total disregard of the pressing need to give justice to the victim and his family. This is a dangerous distortion which needs to be corrected. In every criminal case justice should be done equally and equitably to all the parties, namely the victim, the society and the criminal - and our priority should be arranged in that order. Unfortunately, the priorities of our criminal justice system are so vague and unrealistic that most of the lawyers, jurists and judges are bothered mostly about ensuring that no injustice was done to the accused. Then, is it any wonder that we are heading towards a criminal society? All of us know that the average citizen has

developed some sort of disdain, if not contempt, towards the criminal justice system of this country. Thus, we have reached a stage where a conscious and deliberative decision has to be taken by all the constituents of the system whether it is fair and just on their part to accord such overriding priorities to the interests of the accused and altogether ignore the lament of the victims of crime and societal protests against growing criminality?

8. The criminal laws of our country bristle with quite a few conundrums which militate against truthful investigation and expeditious trial. Some of these legal provisions discussed in the following paragraphs have made a paneful impact not only on effective police functioning and investigation of crime, but also undermined the entire process of criminal justice by legalising untruth. These provisions are like blinkers which we have continued to wear even after independence. Their contribution to introducing several distortions in the system is both massive and remarkable. For instance, the provisions of Section 25 and 26 of the Indian Evidence Act of 1872, which totally bar the admissibility of any confessional statement made either to a police officer, or in his presence, have not in any way helped in the acquittal of the innocent, nor punishment of the guilty. On the contrary, these provisions have created a peculiar situation where a criminal even if he wants

Even when a confession is made before a Magistrate certain formalities stipulated in Section 164 Cr.P.C. have to be observed, which inter-alia entail that the Magistrate should warn the person making the confession that he was not bound to confess his crime, and that if he did so it may be used as evidence against him. Once in a while it does happen that the conscience of a criminal may prick him after committing a dastardly crime, such as a rape or a murder, and he might be overwhelmed by remorse, or lose all hope of escaping the long arm of the law. In such a state of mind he may be prepared to make a clean breast of everything, either due to a feeling of guilt or in the hope of obtaining lenient punishment. But our present legal system does not take into account any of these considerations. It insists that every criminal must defend himself and should be dissuaded from speaking the truth - and when he ventures to speak truth it should not be easily accepted. In other words, there is a legal premium on telling lies, as far as the accused is concerned.

9. The statutory bar on the admissibility of confessions made to, or in the presence of a police officer, is a peculiar feature of the Indian law of evidence. In the USA, France, Russia, Germany, Belgium and several other countries such confessions are admissible and considered valid evidence during

trials. Even in England, there is no such blanket legal embargo on confessions made to, or in the presence of a police officer. The law as it exists in our country proclaims a total distrust of all ranks of police officers from the constabulary to the Inspector-General. Yet quite interestingly the law itself has provided a narrow, but devious, detour to investigating officers in the form of section 27 of the Evidence Act which allows a discovery made by the police at the instance of the accused admissible for the purpose of evidence. Thus, if a murderer goes to a police station and says that he has killed his wife or her paramour, his confessional statement made to police officer is inadmissible. But if he further adds that the body of the deceased was lying in place 'X' and subsequently leads the police to the discovery of the body on the spot, the fact of the discovery of body is fully admissible in evidence. Is it not quite amazing that most of the courts tend to heavily rely on such discoveries, though they are totally opposed to the idea of making a confession made to a police officer admissible as evidence. It may be mentioned that till 1872 under Section 19 of the ancient Regulation XX of 1817, the investigating officers could record confessions of criminals and produce such confessions in evidence and it was left to the good judgement of the courts to assess whether the confession was voluntary and worth relying upon.

However, in 1871 when the Law Commissioners came to India to draft the Indian Evidence Act they jumped to the conclusion that most of the confessions being produced in evidence were involuntary and in some cases even fabricated. Accordingly they recommended that all confessions made to police officers should be statutorily excluded from evidence because these savoured of extortion and fabrication. Many police officers have a felling, which is shared by some well-meaning citizens 4 too, that the existence of Sections 25, 26, and 27 of the Evidence Act in their present form for more than 100 years, has not in any way contributed to the efficiency or image of our criminal justice system. It may be recalled that the Law Commission in their XIV Report, Vol. II, had recommended that police officers holding gazetted ranks fully merited the confidence and trust which would justify reliance on a confessional statement made before them in the course of investigations personally conducted by them. But the recommendation did not find favour with the legislators and the jurists.

10. Some time ago there was a furore in the press when it came to light that the police were using some persons of questionable antecedents as stock witnesses. But anyone who is familiar with the provisions of Section 100 Cr.P.C. should not be surprised, much less shocked, by the discovery. According to Section 100 Cr.P.C. when a police officer makes a search of any house or place, he is required

to call two or more independent and respectable inhabitants of the locality in which the place to be searched is situate, or of any other locality, if no such inhabitant is available or willing to be witness to the search and ask them to attend the search. It may be mentioned that before 1973, under the corresponding provisions of Section 103 the police officer making a search was required to call two or more respectable inhabitants of that very locality in which the house to be searched was situated. However, in the revised Code of Criminal Procedure, 197 3, the condition of the witnesses being from the same locality was softened to some extent, but an additional requirement of ensuring that the witnesses were independent was added. Without questioning the intentions of the framers of law it may be pointed out that in the real life of a police officer this requirement of summoning two independent and respectable witnesses, preferably of the same locality, is a tall order. One fails to understand how and from where a police officer who tracks down a boot-legger or dope-peddler to his hideout on the bank of river Jamuna, say on a cold winter night at 2 AM, will get two independent and reliable witnesses whose presence he is required to ensure by statutory provisions of the law? The Sub-Inspector who achieves a vital breakthrough in the investigation of a heinous crime and reaches the doorsteps of a notorious gangster finds himself on the horns of a dilemma. If he waits for the arrival of

witnesses the criminal gets off the hook. If he is truthful and does not wait for the witnesses he will be doubly doomed: firstly his senior officers and entire official heriarchy will suspect his bonafides because it is common knowledge that a search made by a police officer on his own will not be accepted in law courts unless it is corroborated by two 'Panchas' and to that extent the case cannot be sent up for trial, and secondly even if the case goes before the court his conduct in not carrying out the search in presence of two independent and respectable witnesses is bound to invite strictures thereby resulting in his suspension and dismissal from service. How do you expect the Sub-Inspector to overcome this problem? Let me make it clear that every Sub-Inspector, or for that matter even Superintendent of Police, is a mere mortal. He is not, and cannot afford to be, a theoretician or idealist like some of our jurists and honourable judges. Therefore, the Sub-Inspector has found his own solution to the problem in the form of stock witnesses, howsoever crude or devious you may call that solution.

11. Here I am reminded of a real life experience of a young probationer undergoing training at a district headquarters several years ago. He came face to face with the tragic reality of our criminal justice system when he found that in an ordinary case of raid on a gambling den, when on his insistence the case

was sent up for trial in its truthful and bare form, stating that the raiding party had found some of the playing cards torn and that in the confusion created by the raid the stake money as well as the "Nal" (i.e. Commission of the keeper of the Gaming House) could not be separately accounted for, it was thrown out by the magistrate in the initial stage of trial - as predicted by the Sub-Inspector Incharge of the Police Station. But another case of raid on a gambling den sent up for trial by the experienced Sub-Inspector after proper padding, in which there were no torn playing cards and the Commission of the keeper of the gaming house as well as the stake money had been separately shown and accounted for, resulted in conviction. The message was clear and loud. Whatever is truthful and logical is not easily believed by courts and whatever is untruthful and unrealistic is readily believed and relied upon. Such indeed is the stark reality of the criminal justice system for which, and in which, all of us, the police officers, the lawyers and the judges, work and live. After all, in most of the raids on gambling houses, some people will jump over walls, some cards will be torn, or implements of gambling destroyed and money will be strewn all over the place. Seldom would the police be able to catch the professional gamblers with the stake money and the commission intact. But the admission of such a situation by the police and thereby basing the case on true facts will not be accepted by courts and is sure to invite strictures on grounds of procedural lapses

and inefficiency. On the other hand, a cleverly padded case even if it runs contrary to all logic is readily believed and ends in conviction.

12. Add to the requirements of Section 100 Cr.P.C. the prospect of a genuine witness being called to the court repeatedly on different dates and you will know how our criminal justice system has encouraged the mushrooming of stock witnesses. The inordinate delay in trial of cases and the day-long waiting in courts will discourage any good citizens, who may be otherwise willing to testify against criminals, from coming forward as witnesses. By the time a witnes is summoned for testimony in court valuable months and even years might have passed and he may not even remember much of what he had seen.

13. Again witnesses are not allowed by law to see or refer to the statements made by them months or years ago to the police for refreshing their memories. God alone knows why a witness cannot be allowed to refer to his statement made to the investigating officer, especially if he is summoned by the court after a lapse of 6 months or one year. Surely the law should not presume that every witness must have infallible and prodigious memory. Since the law does not allow a witness to refresh his memory by referring to his statement made during the investigation, the policemen take recourse to tutoring him on the sly. Most of the police officers are emphatic that if

witnesses were allowed to see their earlier statements made to investigating officers for refreshing their memories, the malpractice of tutoring the witnesses will die a natural death.

14. Then comes the fine art of cross-examination of witnesses. It is the biggest deterrent to good citizens coming forward as witnesses. Referring to the grilling and marathon cross-examination of witnesses, often accompanied by unseemly shouting at them, sometime ago the Hon'ble Chief Justice of the Supreme Court had observed that if cross-examination meant harassment of the witnesses in the manner in which it was presently resorted to then it was better that such an "art of cross-examination dies away." But even such a straight and truthful observation was roundly criticized.

15. It is the prosecution which must prove its case beyond reasonable doubt and the accused need not open his mouth. For instance, when Billa was tried for murder, neither the police counsel nor the trying judge could cross-examine him on any point. Yet the redoubtable Billa and his lawyer could grill the witnesses for hours trying to impeach their veracity and truthfulness.

16. Furthermore, the accused is not required to file his defence before the trial starts or even after his trial. He is free to take any line of defence that he likes and may even spring a surprise on the

prosecution. During trial the accused cannot be asked by the court to give on oath his version of the case nor can the prosecutor ask the accused any worthwhile questions. Even the judge cannot put to the accused any probing questions which may take the shape of cross-examination.

17. Generosity of the law to criminals was further extended some years ago by incorporating in the Cr.P.C. a provision for anticipatory bail. In serious non-bailable offences like murder, dacoity and rape, if the police are unable to complete the investigation and send the case for trial within 60 days of his arrest, even the worst criminal, whether he is a murderer, rapist, or a robber, is entitled to be released on bail. Thus, while the police are required to finalise investigation of heinous crimes at the earliest, there is no time limit for completion of trial.

18. The cumulative effect of all these provisions has been to debilitate the entire system so much so that the people have lost faith in the courts as well as the police. It is therefore desirable to achieve some sort of consensus about the goals of the criminal justice administration, with accent on problem solving rather than pedantic rhetoric. Needless to mention that the system needs to be brought as close to truth as may be possible.

19. To achieve the twin goals of dispensing speedy justice and reducing criminality in the society it is

necessary to make certain amendments in the Cr. P.C. as well as the Evidence Act. It may be recalled that even Sir James Stephens who had drafted the Indian Evidence Act of 1872 had observed that : "I do not think that any Act of importance ought to last more than 10 or 12 years. At the end of that time it should be carefully examined from end to end, and whilst as much as possible of its general frame-work and arrangement are retained, it should be improved and corrected at every point at which experience has shown that it requires improvement and correction." Beyond quoting the author of the Evidence Act himself it is hardly necessary to dwell upon the need for drastic changes in the law to meet the crisis situation now staring at the system.

20. I must admit that in discussing certain facets of our criminal justice system in this Paper I have been influenced by my experiences as a law enforcement officer. Perhaps to that extent I may be guilty of occasional subjectivity here and there. Even so I have tried to put forth the cold facts rather bluntly in the hope that an attempt may be made to find solutions to some of these riddles through deliberations of this seminar.

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EMERGING CONFLICTS BETWEEN THE POLICE AND THE PROSECUTION

- B.K. ROY*
- D. BANERJEA@

It is true that the Judiciary, the Police and the Correctional Services are the three major components of the criminal justice system. It is equally true that the prosecution is also an important part of the same system. The "Public Prosecutor" has been rightly depicted as the "key stone in the arch of justice" and the "pivot on which the administration of justice in the State turns". A fair and effective prosecution is as much crucial for advancing the cause of justice as an impartial and efficient investigation. The judiciary cannot function properly unless it is ably assisted by the prosecuting agency. It is the prosecutor whose duty it is to aid the Judge in discovering the truth. His role and function in the furtherance of criminal process are, therefore, of considerable significance. That being the position, the prosecution as a sub-system within the criminal justice system cannot be ignored in determining the consensus and conflict in the administration of criminal justice.

In this country, the primary responsibility of prosecuting serious offences, which are classified as cognizable offences, is on the 'Executive authority' (vide AIR 1957 SC 389). Police is the strong arm of the executive. In the past, the prosecution was, more or less, under the control of the police. Prosecution in the courts of Magistrates used to be conducted by the police officers themselves or by lawyers recruited from the Bar and designated as Assistant Public Prosecutors or otherwise, who were either part and parcel of the police department or were regulated and supervised by the Superintendent of Police at the district level. In the circumstances, the identity of the prosecuting agency was practically merged with that of police and the prosecution branch was not recognised as having a separate and distinct entity, independent of police control.

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The Law Commission of India, which was constituted in 1955, examined the system of prosecution as was obtained at that time, pointed out the defects and infirmities from which it suffered and recommended, among other things, that the prosecuting agency should be completely separated from the police dep artment (Fourteenth Report). That report of the Law Commission was a land-mark in the history of prosecution in India. All the recommendations of the Law Commission bearing on the prosecution did not find favour with the government. The model of prosecution, as evolved by the Law Commission, was not adopted by the Parliament in its entirety. Yet, the new code of Criminal procedure, 1973 (Act II of 1974) reflects unmistakably some of the ideas formulated by the Law Commission in this regard.

The changes brought about by the new Criminal Procedure Code with respect to prosecution are significant. The police officers have been debarred from acting as prosecutors except under certain special circumstances. Public Prosecutors, Additional Public Prosecutors can be appointed by the government alone, Central or State. The authority of the District Magistrate and the Sub-Divisional Magistrate for appointment of Public Prosecutors has been taken away. The power of the District Magistrate to appoint Assistant Public Prosecutor has also been curtailed subject to an except ion. That exception is intended to meet a particular contingency, that is, when an Assistant Public Prosecutor duly appointed by the government is not available. Otherwise, Assistant Public Prosecutors should also be appointed only by the government and none else.

The Code of Criminal Procedure 1973, has, therefore, introduced a new set-up of prosecution in this country. A study has recently been undertaken in the National Police Academy about the impact of the new Criminal Procedure Code on the prosecution machinery. The results of that study reveal that the state of prosecution in most of the States in India is in a bad shape and that the conditions of prosecution prevailing in some of the States are almost chaotic. That study report further discloses that the standard of prosecution, specially in the Courts of Magistrates, has been deteriorating in many States since the introduction of the new code of Criminal Procedure, to the detergment of the administration of criminal justice.

If the two sub-systems, the police and the prosecution, do not work in close harmony and utmost co-operation, then the criminal justice system is likely to break down. Hence, it is very essential that the areas of conflict between these two wings should be identified with a view to finding out a solution to the problem arising out of such conflicts.

One thing is very clear. A successful investigation leads to prosecution and a successful prosecution ends in conviction of the offender. The goal is, however, not conviction but justice, which means that the innocent should be acquitted and the guilty should be punished. It is for the police to investigate and to collect legal evidence, if any, against the accused and to send him up for trial if the results of investigation so warrant. It is for the prosecutor to present the case before the court for determination of the guilt or innocence of the accused. The investigation and the prosecution are, therefore, the two sides of the same coin and both have the same goal. Yet, they are falling out and blaming each other for the failure of criminal cases in the courts. Why?

A serious controversy is revolving round the question as to who should be vested with the administrative control over the prosecuting agency. The new code of Criminal Procedure is silent on this point. This legislative silence is sought to be interpreted in the light of the recommendation of the Law Commission. The Law Commission has envisaged an independent prosecuting agency, completely separated from the police and absolutely free from police control. The contemplated or attempted separation of the prosecution from the police

in an undesirable form has widened the gap between the prosecution and the police, adversely affecting the working of both the sub-systems. On the other hand, some Police Commissions that were set up by the State Governments have expressed a contrary opinion. The Assam Police Commission (1971) observed "that it would be advantageous and proper if the prosecution agency continues to remain under the control of the police department". The Delhi Police Commission recommended that "members of the prosecution organisation should remain under the control of the Head of the Police. They should form a separate cadre in the police establishment". The controversy was taken to the Allahabad High Court by a group of Assistant Public Prosecutors, who felt aggrieved when the Government of Uttar Pradesh issued an order dated 15th March 1975 placing them under the control of the police. The Allahabad High Court, quashed that government order, holding, inter alia, that it was inconsistent with section 25 of the new Criminal Procedure Code (vide 1976 Cr L.J. 32). The matter did not end there. At the instance of the Government of Uttar Pradesh, section 25 (2) Cr. P.C. was amended by the U.P. Act 16 of 1976, so as to empower the State Government to exercise control over the Assistant Public Prosecutors through police officers. The validity of that amendment Act was also challenged but without any success.

The policeman's point of view is that as the police are morally, in the eyes of the common man, responsible for the failure of the cases in the Court, even when it is due to inept handling of the cases by the prosecutor, and as the police have to face the consequences of a guilty escaping punishment, it is fit and proper that they should be vested with the supervision and control of the prosecuting agency. This stand is resented by the prosecutors and that is an important area of conflict.

Another point of conflict has arisen out of the question as to who should decide finally whether or not a police case is fit for prosecution. Investigation of a cognizable offence is the field exclusively reserved for the police department. The power of the police to investigate cognizable offence is uncontrolled by the magistracy and even the Higher Courts cannot interfere with police investigation unless the power of investigation has been exercised by a police officer mala fide. Formation of opinion is the last stage of police investigation. Under the law for the time being in force, it is for the investigating agency to determine finally whether or not a case should be sent up for trial. The legal position is clear and free from ambiguity. Yet executive or administrative instructions have been issued in most of the States that the police must, as a matter of practice, seek the opinion of the prosecutor before submitting a report in the final form at the close of investigation. A prosecutor may be consulted by the police whenever they think it necessary but the police can not be asked to abrogate the discretion conferred upon them by the Law and to adhere blindly to what advice has been given by the prosecutor. That will tantamount to to shirking of their statutory responsibility and informal intervention of an outside agency in the domain which exclusively belongs to them. In the alternative, if the police submit charge-sheet disregarding the views of the prosecutor to the contrary, the prosecutor may not be genuinely interested in conducting prosecution of that case instituted on police report against his will. Thus, it is found that the unfettered discretion of decision-making vested in the police by the Law is being eroded in practice, giving rise to a situation of uneasiness and dichotomy.

That apart, another question that suggests itself at this stage is: Will it be very consistent with the contemplated role of the prosecutor to associate himself with the police during the stage of investigation? If the prosecutor is to take a detached and objective view of the police cases, as is expected of him, his involvement by way of rendering advice, suggestion, guidance for the

removal of defects in the investigation or for the improvement of the quality of investigation, may be construed as active participation in the process of investigation and may militate against his image as an independent public functionary. A prosecutor is thereby called upon to perform dual functions - one as prosecutor after a prosecution is actually launched in court and the other as Legal Adviser to the police officers during the stage of investigation. Law does not expressly prohibit it. Law Commission has not imposed any restriction upon such quality of functions. Is it a consensus or a conflict? The matter is not free from difficulty and has to be resolved in a satisfactory way. Should the police have a different set of legal experts other than the prosecutors for giving legal coverage to the police invest-igation?

Another bone of contention relates to the attitude of the prosecutors. There is no doubt about it that they should be fair and impartial and must not resort to suppresio veri or suggestio falsi to procure convictions. They are certainly not to act as the tools in the hands of the Government or any other executive authority. At the same time, it should be borne in mind that they have undoubted duty towards their client - the State that they being public servants, have social accountability also. They can not be absolutely indifferent to the result of the case. Their clear duty is to see that the justice is vindicated. There is failure of justice not only when an innocent is convicted but also when a guilty is acquitted. In the words of our Supreme Court said in a somewhat different context, "In the meticul-ous hypersensitivity to eliminate a risk innocent from being punished many guilty men must not be callously allowed to escape" (vide 1978 Cr. L.J. 766). Unmerited acquittals or undeserved discharges shake the confidence of the people in the effency of the judicial administration and almost in all such cases, the police get a bad name, although the fault may lie at the door of the prosecuting agency or elsewhere. That is not all. Arduous and costly labour of the police in the investigation of criminal cases is wasted, much to the disappointment of the police officers concerned, if cases collapse in the court on account of defective prosecution. What the police, therefore, expect is that the prosecution should be properly, efficiently and honestly conducted with apositive attitude for securing justice. The attitude of total indifference to the result, as advocated by the Law Commission, has been warmly received by some of the prosecutors- an attitude which most of the policemen find it difficult to reconcile with.

Another sensitive issue which generates friction or irritation between the police and the prosecution comes to the surface when the prosecutor withdraws from the prosecution of criminal cases instituted on police report without the concurrence or even without the knowledge of the police. We are not oblivious of the legal position that it is the Public Prosecutor or the Assistant Public Prosecutor incharge of a case who is legally competent to apply to the court for withdrawal. We are aware that the prosecutor concerned is under no legal obligation to consult the police or any other executive authority in in deciding as to the desirability of withdrawal. On the other hand, the prosecutor concerned must apply his independent mind and come to his own judgement. Section 321 of the Code of Criminal Procedure, which provides for withdrawal, is an enabling provision. It has been held by the Supreme Court that the sole consideration to guide the prosecutor in withdrawing from the prosecution is the larger factor of the administration of justice (AIR 1977 SC 2265). The police feel aggrieved when such consideration does not weigh with him and he is actuated by oblique motive or extraneous matters like political favour, party pressure, personal gain or like concerns. Instances are not aware when prosecutors have abused or misused the power vested in them in this regard, and have thereby tampered with the course of justice for illegitimate purposes. It is submitted that there is no legal bar to the police being hard before the prosecutor proceeds to decide whether or not it is a fit case where an application for withdrawal should be made. Police can not certainly command but they may commend something out of their intimate knowledge, which may be taken into consideration by the prosecutor. Such an opportunity is denied to the police, not infrequently, though they have been chargdd with the duty of ensuring that the offenders are brought to justice. Such an obligation has been imposed upon them by section 23 of the Police Act of 1861.

As soon as the prosecution has been taken out of the control of the police in many parts of India in pursuance of what has been believed to be a "legislative fiat", the prosecuting agency and the police organisation have, by and large, developed a negative, nay, apathetic attitude, towards each other. Most of the investigating officers have started thinking that their duty is over as soon as the charge sheet is submitted to the court and that thereafter they become "functus officio". They have forgotten that an effective prosecution depends to a large extent upon the claim of professional independence have turned to be

unresponsive and indifferent to the lawful needs and genuine difficulties of the police department. They have thereby failed to appreciate the value of a wholesome co-operation and meaningful relationship with the police. The result is that the criminal justice system has been weakened and impaired to an alarming extent. This is mainly because of the fact that there is practically none to co-ordinate the activities of these two a encies with a view to achieving thei common aim. Where consensus should prevail, conflict has taken its place and is holding out a grave threat to the efficacy of the criminal justice system itself.

The areas of conflict delineated by the words aforesaid are not exhaustive but only illustrative. The investigation and the prosecution are closely inter-related to each other and directed towards the protection of the community from the criminal activities. It must not be assumed that the investigation and the prosecut ion are the matters of concern only for the policemen and the p-rosecutors respectively. These are very vital links in the chain of the criminal process in which the people are deeply interested. The peace and prosperity of the society rest on the harmonious and efficacious operation of the criminal process. It will, therefore, be in the larger interest of the society that all conflicts between the police and the prosecution should be resolved urgently and satisfactorily. It is hoped that the proposed National Seminar on "Decision-making in Criminal Justice System" to be held in New Delhi under the auspices of the Indian Institute of Public Administration from 29 September to 1 Oct. 1980 will address itself to that solemn task and offer a viable solution, which will bring about harmony in ~~xxx~~ and give greater degree of dynamism and efficiency to the administration of criminal justice, so as to transform it into an effective instrument for securing justice - social, economic and political.

PAPER BY SHRI S.S. GILL, INSPECTOR-GENERAL OF PRISONS, PUNJAB.
ON
ROLE OF CORRECTIONAL SERVICES IN CRIMINAL JUSTICE SYSTEM
READ IN THE NATIONAL SEMINAR ON DECISION-MAKING IN CRIMINAL JUSTICE SYSTEM HELD FROM 29-9-80 TO 1-10-80 AT INDIAN INSTI- OF PUBLIC ADMINISTRATION, NEW DELHI.

Introduction.

It is a sign of the increasing concern of our Government and our society for the criminals that a Seminar of this nature has been organised by an Institute of the calibre of the Indian Institute of Public Administration. It reflects the keen interest which is proposed to be taken in the formulation of the policy for Criminal Justice in our country. The debate in this forum is most opportune in the context of the increasing incidence of crime both qualitatively and quantitatively.

Correctional Services form the final rung in the process of Criminal Justice. When the offender reaches the precincts of the prisons, the damage, if I am allowed to put it in simple language, to his personality has already been done through different processes of being accused, of being charged with the offence, of trial for the offence and of subsequent conviction. It is the responsibility placed by the Criminal Justice System and the society on the Correctional Services, i.e. the Prison staff, to deal with him from this stage, in such a way as to make him fit for rehabilitation, both during the period of his stay in the prisons and afterwards in the society, on release. This is an onerous task, which has to be completed in the short span of the stay of the prisoner in the institutions.

The participants in this discussion are well conversant with the fact that correctional institutions have limited resources both by way of finances and methodologies. Every criminal is to be handled on a

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uniform pattern irrespective of the fact as to how and why he committed the particular crime. In the absence of a scientific approach and facility for reformative services in the prisons, the role of prisons and prison staff towards correction is a mere apology for the same.

Organisation.

For the purposes of administration and supervision of the penal and correctional institutions in Punjab, there is one Inspector-General of Prisons helped by two Assistant Inspectors-Generals (one for General Administration and the other for industrial operations in prisons), one Chief Welfare Officer, one Chief Probation Officer and one Accounts Officer.

Prisoners are governed under basic laws and regulations i.e. the Prisons Act, Prisoners Act, Borstal Act and compendium of rules entitled Manual for Superintendence and Management of Jails. There are five Central Jails, four District Jails, 14 Sub Jails, one Borstal Institution and Juvenile Jail, an independent wing for female prisoners under the administration of the Superintendent, Central Jail, Ludhiana and two Open Prisons in the State.

Children Act is in operation in the State. There is one Certified School, one After-care Home and a few Remand Homes. The operational control of this Act vests in the Social Welfare Department.

Officers working in Prisons comprise of warders, Head Warders, Assistant Superintendents, Deputy Superintendents and Superintendent Jails. In each Central and District Jail including B.I.&.J.Jail, Faridkot, there are technical instructors for imparting training in various industries.

For medical care of the inmates and the staff, there are Medical Officers @ two at each Central Jail and one at each District Jail. They are helped by Pharmacists and male nurses selected from amongst the educated prisoners. For the welfare of the inmates, there are Welfare Officers two at each Central Jail and one at each District Jail. For the recreation of the inmates, there are Dramatic Clubs, T.V. sets and Projectors at all Central and District Jails. At the Sub Jails, there are whole-time Prison officers of the rank of Assistant Superintendent under the control of a part-time State Civil Service officer, who performs the duties of the Superintendent Jail. For the medical care, there is a part-time Medical Officer or Pharmacist according to the number of the inmates in each Sub-Jail. For the education of the inmates, there is one trained teacher in every Central and District Jail, who imparts adult education to all the illetrate prisoners. Educated prisoners assist the teachers. There is a High School for the education of the juveniles in the Borstal Institution and Juvenile Jail. Facilities for the inmates to persue higher studies are arranged with the help of school teachers at B.I.&.J.Jail, Faridkot and trained teachers at other jails as well as through correspondence courses run by various Universities in the State.

Vocational Training & Prison Industries.

Vocational training programme in prisons is intended to equip the prisoners with better opportunities for employment and proper rehabilitation through improved

work attitude and skills. The following industries are run in the jails:-

1) Carpentry.
2) Steel-furniture making.
3) Textile Industry.
4) Durrie-making.
5) Carpet-making.
6) Blanket-making.
7) Niwar-making.
8) Ban-making.
9) Chalk-making.
10) Soap and Phenyle-making.
11) Cut Glass work.
12) Leather work.
13) Smithy work.
14) Book-binding.

Punjab State being mainly Agriculture State, agro-based industries like Dairying, Poultry, Piggery and Fishery are also run in selected prisons. Training in scientific methods of agriculture is imparted in all Central and District Prisons. Schemes for giving training in Repairing of Tractors, Electric and Diesel Engines and teaching of Typing work are under consideration.

To give incentive to prisoners and to save the family of a prisoner from the burden of sending money to the prisoner for expenses on Jail canteens, there is a Wage Earning Scheme. For this purpose, the prisoners are divided into three categories - skilled, semi-skilled and unskilled. The unskilled prisoners include new-comers and the prisoners working on essential services and in the small farms attached to the jails. Semi-skilled prisoners are those who are employed on ordinary type of industries like Ban-making, Niwar-making etc. The third category i.e. skilled prisoners are those who are able to work efficiently to produce goods saleable to other departments and to the

public outside. They are paid at different rates. The wages are credited to the account of the prisoner from which he can spend upto a fixed limit per month. Balance is paid to him at the time of his release.

Classification of Prisoners.

Classification of prisoners is based on the degree of security, length of imprisonment, age and sex of prisoners. Majority of the prisons are of the maximum and medium security type, the main reason being that they were built many years ago to suit the old deterrent theory. The Borstal Institute has features of medium security whereas the Open Prisons may be called the minimum security prison. Prisoners are divided into three categories; (a) Unconvicted which includes those on remand or awaiting trial, (b) Civil committed to prison for failure to repay the loans obtained from Government or semi-Government agencies and even committed for debts of private persons and (c) Convicted - those serving a term of imprisonment. Persons detained under Preventive Detention Acts are also kept in the prisons. Strict sagregation is enforced in respect of sexes. Young offenders are kept separate from adults, unconvicted from convicted and civil and detenus from criminal prisoners as far as possible depending upon the availability of separate wards for each category. On the basis of education and status in life, there are two classes viz; ordinary and 'better' class. There is difference of food, clothing and accommodation between these two classes.

Probation and Parole System.

At present, there are two Acts for release on Probation of offenders:

(i) Probation of Offenders Act, 1958 and

(ii) Good Conduct Prisoners' Probational Release Act, 1926.

The Probation of Offenders Act was enforced in our State first on experimental basis in a few districts. Later on it was extended to the whole of the State. Under this Act, first offenders of certain categories are released. Some of them are released without supervision while some are released under supervision of the Probation Officers. The officers appointed under this Act are answerable to the Court by whom they are entrusted with the duty of supervision. The number of adult probationers is now quite high though in the beginning it was relatively small since the Courts did not make liberal use of probation.

Release under G.C.P.P.R. Act, 1926 is as a matter of fact release on parole but since the coming into vogue of this Act, the release under this statute is called release on probation, which is a misnomer in the real sense of the word. Except this, there is no other statute for release of offenders on parole in our State.

Besides these two statutes, there is one Good Conduct Prisoners' (Temporary Release) Act, 1962. Under this Act, prisoners are granted parole of 28/42 days to attend to marriage etc. and agricultural work by the prisoners. This concession is allowed to prisoners only if the District ~~Magis~~ authorities do not object to their release from law and order angle. Number of prisoners

released under this Act during the last three years is as under:-

1977	574
1978	608
1979	862

After the prisoner serves three years imprisonment, keeping his good conduct in the prison in view, he is allowed 21 days leave in the first instance and 15 days leave every year, called Furlough, which is counted as sentence served. For this too, if a prisoner is not granted parole earlier, no objection is necessary from the District authorities. Under this Act, emergency leave called parole is also granted by the Superintendent Jail in case of serious illness or death of a member of the family of the prisoner. Number of prisoners released under this Act during the last three years is as under:-

1977	178
1978	204
1979	243

ISSUES.

1. Identification of the areas of inter-component and intra-system conflicts which have to be eliminated or minimized.

(i) Police and Corrections.

Police is pre-occupied by traditional legal ideas and some times resort to inflexible and stereotyped thinking. Their attitude towards the offenders is punitive and requires reorientation towards correctional programmes. The police personnel do not have faith in the correctional theory of dealing with the offenders

been observed in formal and informal discussions between officers of the two departments when, on the plea of the lack of cognition of reality, the pleadings of the Correction staff are made fun of by the police officers.

In advanced countries, opinion and assistance of the Probation Officer is sought by the Police before conviction but in our country even Social Investigation Reports are not called for in every case.

While producing the under-trial in court, during transit from the jail to the court, the offender is generally treated in such a manner that it undoes the little reformation which has been attempted by the Prison staff on him. Either there is over-reaction by the police staff or over-leniency with the offender which undermines discipline on his return to the jail as also leading to frustration in him.

When an offender is released by the court on probation, he is under the supervision of the Probation Officer. Experience has shown that the probationer is kept under constant fear by the local police and in some cases there is harassment to the extent of saying that he would be sent back behind the bars. This results in difficulties in the proper implementation of the Probation of Offenders Act and defeats the object of releasing the offender on probation

The requests of the prisoners for release on furlough and for premature release initiated and recommended by the Prison authorities are generally not sympathetically examined on merit of each case. It is felt that some times the opposition is merely based on purely theoretical arguments

(ii) Judiciary and Corrections.

The role of the prisons is of a custodial nature. Under-trials/prisoners are to be produced in the courts by the police. Experience has shown that if for some reasons the undertrials/prisoners fail to appear in the court on the date summoned, it is the Prison officer who is held up for contempt.

Open Air Jails are being given the increased importance in the context of reformation. Every State has set up a few experimental Open Air Jails to begin with. Prisoners are allowed comparatively more freedom in these jails and in fact, are allowed to remain out-doors even at night. So some escapes are natural. Such cases are dealt with under similar enactments and with the same strictness as escapes taking place from the traditional jails.

A recent trend in judicial pronouncements curtailing the executive powers of the correctional staff is likely to create administrative problems for the smooth functioning of the prisons.

Most of the Judicial Officers are either not conversant with the spirit behind the release under the Probation of Offenders Act or are not having any faith in the reformative theory. Social Investigation Reports are not called for in most of the cases by them, only in a few cases are these reports taken. When deciding the cases, no recognition is given to the Probation Officers by them. Probation Officers are looked down upon being junior in status and are not allowed time or opportunity to express their views on a case gathered as a result of their investigations.

As stated earlier, probation as a form of sentence is not much used by the courts. The Probation System is misconceived to be a form of leniency or as a let-off even amongst the Judicial Officers. For this reason, they do not recognise the essence of probation and do not consider each case on its own merits. This misconception which persists among officers charged with the enforcement of the law arises from the persistant primitive view towards treatment of an offender. Public in general and the sufferers at the hands of an offender do not at all cooperate to make this system a success in the state. Instances are not lacking where even the members of the bar and the officers connected with prosecution mis-use this system as they blackmail the offenders released under this Act by telling them that they have been got acquitted from the Court.

(iii) Intra-system Conflict.

As listed above, the Prison staff is divided into three categories: (i) the executive staff concerned with the administration of the institute, (ii) welfare staff concerned with their welfare and the probation system, and (iii) medical staff.

Generally, it is observed that the attitude of the executive staff towards a particular prisoner is not always in line with the attitude taken by the Welfare Officer and Medical Officer. There is basic difference in approach of the two factions. The interest of the executive staff is to maintain discipline and to extract

staff is concerned more with the general welfare, recreation and health of the prisoner. It is this basic approach which results in different treatment meted out by the two factions to the prisoners.

2. Devising a suitable machinery in the criminal justice system to provide the feedback to increase mutual understanding and help in the identification of attitudes which are discrepent with the common goals.

A high-powered board/committee at the State and District level comprising of the top officers of the three departments should be formed and should meet as frequently as possible to sort out general and specific problems of each of the components. In England and in many other countries, there is an annual meeting held under the auspices of the learned Chief Justice and attended by Judges, Ministers, Justices of the Peace, Criminologists, Prison Psychologists, Sociologists and Lawyers at which problems of common interest are discussed. A conference of this nature is necessary in our country also for combined uniform approach.

One appreciates that Judges are not wholly unresponsive to other means of penal measures though retribution is generally the dominant philosophy. The object of criminal justice now emphasises that punishment, whether with pain or without, inflicted upon a person because of a crime is only the means and not the end of criminal justice. In view of the above, the Judges, if not before appointment, should get in-service training in Psychology and Sociology so that their attitude should be

There should be a Board of Pardons and Parole, which along with other members, should have on it a Sociologist, an Educator, a Psychiatrist and other persons qualified in social disciplines. Atleast one of these members should be a woman. Once every six month, the prison officers should forward to the Board of Pardons and Parole the records of all prisoners who have served the minimum term of their sentences. These cases after investigation by the officers concerned should be put up for deliberations by the Board. If need be, the prisoner could appear before the Board for further investigation. Keeping in mind the facts and circumstances concerning the commission of the crime, the prisoner's own version of the case, his family background, habits and heredity, mentality and attitude towards discipline and towards society as evidenced by his institutional record, previous convictions and the probablity of committing the crime again and the reports of the Prison officials regarding his conduct and work, the Board should authorise the release of the prisoner on Parole if it is convinced that it is a fit case for being so released.

Regional Training Schools, where the officers of the three sub systems after completion of their training in their respective departments should be deputed for a coordinated and comprehensive training in the attitudes conducive to the attainment of the common goal of socialization of criminals, should be set up.

Provision of special funds in the departmental Budget

only the theoretical advancement in the knowledge of the offender and his conduct at different stages of his conviction and treatment that can lead to the formation of correct attitudes for the common goal.

That research is a powerful force for change in the field of Criminal Justice perhaps can best be documented by the history of the Vera Institute in New York City. Here the research of a small, non-Governmental agency has in a very short time led to major changes in the bail system of approximately 100 cities, several States and the Federal Government. Efforts of scholars and other independent experts to understand their programmes and operations should be welcomed by the Criminal Justice agencies.

The establishment of an independent National Criminal Research Foundation to stimulate and coordinate research and to disseminate its results with a few Regional Research Institutes under it, may be considered.

3. <u>Enhancing the problem-solving skills of the sub systems through organizational restructuring since conflict generation is also due to the structural deficiencies of the components evolved in a particular context.</u>

In view of the added emphasis on the reformative principle, the Prison administration needs organisational restructuring. Specific suggestions in this respect are as under:-

(a) The administration of all statutes connected with juvenile delinquency, adolescents and adults should vest with the I.G. Prisons, whose designation be changed to Inspector General of Prisons-cum-Director Correctional Services. A senior officer of the rank of Dy. Director of

headquarter staff, who would be in a position to give his concentrated and pointed attention only to the work of Correction vis-a-vis day-today administration of the Prisons.

(b) Adequate supportive staff in the field for the Correction wing be provided through specialised posts of the nature of - (i) Psychologists - to assist in proper classification of prisoners at the time of admission and to give occupational theropy, (ii) Psychiatrists - for the rehabilitation of mentally deranged cases, (iii) Sociologists cum Case Workers - for providing proper feed-back and to further the knowledge of research workers as proposed above, and (iv) increase in the number of Probation Officers - every-Probation Officer should be allotted a specific area on the pattern of blocks to be administered by Block Development Officers as it is not physically possible for the present number to cover the vast area now being covered by them.

(c) Adequate arrangement for travelling in rural area should be provided to the touring staff.

4. <u>Elimination of unrealistic constraints in the existing criminal law and procedure through appropriate reform.</u>

(a) Maximum use of the probation and parole facilities be made for proper rehabilitation of prisoners. A recent research conducted in Japan has compared the community conduct of parolees to that of those released after serving a full sentence and has shown that within 18 months after release, one-third of the former group had committed further offences while more than one-half had done so in the latter group. This research is of special significance to bring out the importance of reformative impact of parole. Suitable

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statutes enabling the prisoner to be released on parole in such a way that it does not only amount to a furlough but permanent release should be enacted. This would lead to better response by prisoners to the reformative approach.

(b) The constraint imposed by the latest amendment of Cr.P.C. inserting Section 433-A is hampering the reformative objective. There is an all-round discontentment and deep frustration among the prisoners on account of this amendment. It is common knowledge that a concession once permitted, if withdrawn, leads to deep heart-burning. This has been the case on account of the enforcement of the amendment of Section 433-A Cr.P.C. This new section has taken away the ordinary powers of State Government to release any prisoner convicted for an offence for which one of the sentences is death sentence unless he spends 14 years in a prison. But before this amendment, State Government could release such prisoners u/s 432 Cr.P.C. after imposing certain conditions. Such a harsh provision is very harmful to the Correctional Programme.

SUGGESTIONS.

To sum up, the following suggestions may be considered:-

(i) Setting up of institutions for combined in-service training to officers of the three sub-categories for inculcation of attitudes conducive to the furtherance of the common goal.

(ii) Setting-up of high powered Board/Committee at State and district level for sorting out common problems of the three sub-systems.

(iv) Setting up of extensive and intensive Research Centres in different aspects of Criminology.

(v) Organisational restructuring of the Prison Administration in the States with emphasis on the Correctional concept.

(vi) Enactment of suitable legislation for parole to enable actual premature release of the prisoners.

(vii) Reconsideration of the amendment of Section 433-A of Cr.P.C. with a view to give discretionary power to the State Government regarding release of prisoners conditionally.

(viii) Formulation of Model Statute giving guidelines to States to amend their Statutes dealing with Parole, Furlough and Probation systems to make rules uniform throughout the country.

(ix) Involvement of Social Agencies and public in general to make the correctional system acceptable to the people in general.

(x) Improvement of status and service conditions of the correctional and custodial staff of the Institutions and bringing uniformity throughout the country.

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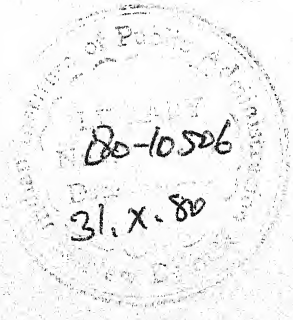

INDIAN INSTITUTE OF PUBLIC ADMINISTRATION
NEW DELHI

NATIONAL SEMINAR
On
" DECISION-MAKING IN CRIMINAL JUSTICE SYSTEM"

SEPTEMBER 29 - OCTOBER 1, 1980

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